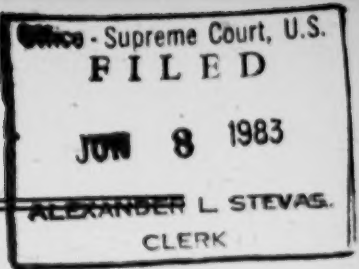


82 - 2042

No. \_\_\_\_\_



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In the  
**Supreme Court of the United States**

October Term, 1982

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Westinghouse Electric Corporation,  
*Petitioners*

V.

Christine Vaughn and Marion Gee,  
*Respondents*

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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## I.

## QUESTIONS PRESENTED

- (1) WHEN A GENERALIZED PRIMA FACIE CASE HAS BEEN REBUTTED BY DEFENDANT'S PROOF OF A SPECIFIC NONDISCRIMINATORY REASON FOR THE EMPLOYMENT ACTION, IS THE PLAINTIFF REQUIRED TO PRESENT EVIDENCE CONCERNING THE PARTICULAR CONDUCT IN ISSUE IN ORDER TO ESTABLISH PRETEXT?
- (2) WHETHER THE DISTRICT COURT'S APPLICATION OF GENERALIZED EVIDENCE FROM THE PRIMA FACIE CASE TO MEET PLAINTIFF'S PRETEXT BURDEN EFFECTIVELY FORECLOSED DEFENDANT'S OPPORTUNITY TO REBUT THE INFERENCE DRAWN FROM THE PRIMA FACIE CASE, AND WAS THEREFORE CLEARLY ERRONEOUS OR INCONSISTENT WITH PREVIOUSLY ENUNCIATED LEGAL STANDARDS?
- (3) WHEN DISCRIMINATORY ANIMUS HAS BEEN SHOWN TO HAVE BEEN A FACTOR IN THE DECISION, MAY THE DEFENDANT OVERCOME A FINDING OF DISCRIMINATION BY ESTABLISHING THAT THE CHALLENGED EMPLOYMENT DECISION WOULD HAVE OCCURRED IN ANY EVENT, EVEN ABSENT THE DISCRIMINATION?



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**PETITION FOR WRIT OF CERTIORARI  
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The Petitioner Westinghouse Electric Corporation<sup>1</sup> respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 11, 1983.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A hereto, and is reported at 702 F.2d 137 (8th Cir. 1983). The opinion of the United States District Court for the Eastern District of

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<sup>1</sup>

Wholly and partially owned subsidiaries of Westinghouse Electric Corporation are listed at Appendix D.

Arkansas, Richard Sheppard Arnold, Circuit Judge, sitting by designation, appears in Appendix A, and is reported at 523 F.Supp. 368 (E.D. Ark. 1981).

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 11, 1983. This petition was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

*United States Code*, Title 42:

§2000e-2. *Unlawful employment practices—Employer practices*

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and under 28 U.S.C. §1331. The dispute arose when the Plaintiff below, Ms. Christine Vaughn, a black female employee, filed suit alleging among other things that she was disqualified in 1971 as a sealex machine operator by defendant Westinghouse Electric Corporation because of her race. At the conclusion of the trial to the court, the district court found against two other plaintiffs on their claims and found against Vaughn on all other claims except the single claim regarding her disqualification as a sealex machine operator. Ms. Vaughn, a black, was hired by Westinghouse on July 13, 1970, as a sealex machine operator, labor grade 4, at \$2.20 per hour. She was transferred on November 16, 1970 to the second shift, and on January 25, 1971, to the third shift due to a reduction in force. She continued in that position on the third shift under the supervision of Mr. C.T. Turnage until April 19, 1971, when she was disqualified as a sealex operator by Mr. Turnage and placed on an open labor grade 1 job, resulting in a loss of pay of \$ .24 per hour. She has remained since that time in the employ of Westinghouse and at the time of trial had attained the rate of labor grade 3 at \$5.40 per hour.

At the time Ms. Vaughn was transferred from sealex operator on the second shift, her shift supervisor, Mr. Brazil, evaluated her quantity and quality of production as poor and recommended that she not be rehired in that position. Two days before that evaluation, an entry was made on a personnel form that Vaughn had had previous satisfactory experience on the second shift.

On the third shift, under Mr. Turnage's supervision, Ms. Vaughn was verbally warned on five separate occasions that her production was unacceptable due to an inadequate number of lamps sealed and too many burnt wires. These



verbal warnings were noted in writing by Mr. Turnage, and his notes were made a part of the trial record. On April 19, 1971, Ms. Vaughn was disqualified from her job as sealex operator. The disqualification form noted that she could not hold this job in the future and stated that although she got along well with others and had good attendance, her work quality and quantity were poor, the supervisor was unable to motivate her, and she showed no interest in the job as sealex machine operator.

The district court originally held that the plaintiffs had established a *prima facie* case of racial discrimination under the rationale of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Vaughn v. Westinghouse Electric Corp.*, 471 F.Supp. 281, 286 (E.D. Ark. 1979). That finding was based primarily upon a finding of low black representation in non-production jobs, an apparent but unexplained adverse impact upon black applicants in the Defendant's hiring decisions, and the proof that Ms. Vaughn had held the position, was disqualified and a white employee replaced her. *Ibid*. The district court then held, with respect only to Ms. Vaughn's disqualification, that Westinghouse had failed to demonstrate proof sufficient to overcome plaintiffs' *prima facie* case. *Vaughn, supra*, at 289-90.

From that judgment, Westinghouse appealed, alleging that the district court had misapplied the burdens of proof. The Court of Appeals for the Eighth Circuit affirmed in a two-to-one majority decision. 620 F.2d 655 (8th Cir. 1980).

On March 9, 1981, this Court granted Defendant's petition for certiorari, summarily vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Court of Appeals remanded with the same directions to the trial

court. On remand, the trial court <sup>2</sup> held that, even though it was in error in placing too great a burden on the Defendant, after reviewing the record as a whole, its original finding of discrimination against Vaughn should be reaffirmed. Westinghouse again appealed, challenging the trial court's finding that the reasons articulated for the disqualification were pretextual. In another two-to-one majority decision the Court of Appeals affirmed, holding that the district court's finding of pretext was not clearly erroneous.

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The trial judge, Honorable Richard S. Arnold, had in the interim between the original trial and the remand been elevated to the Court of Appeals for the Eighth Circuit. He heard the case on remand as Circuit Judge sitting by designation.

## REASONS FOR GRANTING THE WRIT

*The Decision Below Has Resolved An Important Question of Federal Law In a Manner Inimical To This Court's Established Tests for Title VII Disparate Treatment Cases.*

In straightforward terms, the result reached by the Court of Appeals in the instant case is this: Whenever an employer has less-than-perfect statistics concerning black representation in its workforce, the discipline of a black employee, however well-deserved, is accompanied by a presumption that the discipline was racially motivated. Further, the presumption cannot be overcome unless the employer can prove by a preponderance of the evidence that race played absolutely no part in his decision. It matters not that the employee offers no evidence of discriminatory motive or any evidence at all relating to the challenged employment decision. Moreover, it does not matter that the employee would have suffered the same result even in the absence of discrimination.

In the circumstances described above, the court has not found that plaintiff has established a causal link between the unexplained hiring and promotion statistics and the disqualification at issue; rather, the court has simply ruled that defendant has failed to show that there was no causal link. That is not and never has been the law — not under Title VII, and not under any related legal theory. Such a rule imposes an irrebuttable presumption upon the defendant, as well as the burden to prove a negative, or the absence of a fact. Because Title VII creates no such statutory presumption, to impose this burden judicially is clearly error.

In *United States Postal Service Board of Governors v. Aikens*, 51 U.S.L.W. 4355 (April 4, 1983), this Court discussed the meaning of "footnote ten" in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248,

255 n. 10 (1981). After the plaintiff has established a *prima facie* case and the defendant has introduced admissible evidence setting forth the reasons for plaintiff's rejection, the presumption "drops from the case," *Id.* at 255, n.10, and "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255. The plaintiff then has the opportunity to show that the proffered reason was not the true reason, but rather a pretext. The *Aikens* court quoted the following language from *Burdine*, *supra*:

The plaintiff retains the burden of persuasion. [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. 450 U.S., at 256.

*Id.* at 4356. "In short, the district court must decide which party's explanation of the employer's motivation it believes . . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Id.*

In the instant case, the trial court did not find that the employer's proffered explanation was unworthy of credence. In fact, the court did "not doubt that the burnt wires documented by defendant in fact existed, or that production problems were a genuine concern." 523 F.Supp. at 371.

Further, the court noted that after reading and re-reading the disqualifying supervisor's testimony, "[t]here is no reason to disbelieve any of it." *Id.* n. 5. The court instead held, couching his holding in language similar to *Burdine*'s first theory of pretext, that "on balance, the Court is persuaded that plaintiff's race was more likely than not one of the factors that contributed substantially to defendant's decision." *Id.* at 371 (emphasis added). In short, even though "there was virtually no direct evidence of unlawful

motivation on the part of Mr. Turnage," *Id.* at 370, and even though the defendant's documented reasons for its conduct were obvious and un rebutted, the court was somehow persuaded that unlawful reasons more likely motivated the employer. Such a result applies the *Burdine* decision more as an afterthought than as a guideline for allocating the burdens in a Title VII case. It is asserted that, in light of the entire development of disparate treatment analysis, this casual easing of plaintiff's burden of persuasion effectively insures that the defendant rather than the plaintiff shoulders the burden of persuasion once the *prima facie* presumption arises. This creates an irrebuttable presumption that is antithetical to every decision of this Court on the subject since 1973.

In the seminal decision on disparate treatment, *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), this Court set forth an order and allocation of proof which has stood relatively unchanged since that time. In its discussion of the third stage of proof, that coming after defendant has articulated a non-discriminatory reason for its actions, the Court held:

On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. . . . Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.

*Id.* at 804-05. It is significant that, of the factors listed, evidence concerning similarly situated white employees

was considered "*especially* relevant," while, of the factors which "*may* be relevant," only the last one listed, dealing with generalized statistical evidence, was listed with a caveat. That caveat, found in footnote 19, reads in pertinent part as follows:

The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." . . . We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

In *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 578 (1978), this Court was primarily addressing the second stage burden, and merely repeated and reaffirmed the *McDonnell Douglas* test for the third-stage burden. The Court stated, however, that, while not *conclusive*, generalized statistics of the employer's employment practices could be considered in determining his motivation in particular cases. There, of course, it was the employer's balanced statistics which were urged as conclusive by the petitioner. But the reasoning applies equally to both parties — statistics, good or bad, cannot establish a conclusive and irrebuttable presumption in favor of either party in a treatment case. Like any other evidence, they may be rebutted.

Against this backdrop, the Court was presented with the *Burdine* case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Court was again faced with an issue concerning the second-stage, or defendant's burden, but went on to discuss the third-stage burden as set forth above. The clear implication of this series of cases is that the burden of persuasion never shifts; that, because of that, the defendant never has the burden of proving an absence of discrimination; that once a non-discriminatory reason is articulated, the presumption



disappears, and the court must focus more closely on that evidence related to the challenged decision—the more directly-related the better—to determine if the reason proffered is credible; and that, while the generalized statistics of the *prima facie* case are relevant to pretext, they are only remotely and not conclusively so. They cannot be used to shift the burden of *persuasion* by creating a situation in which it is impossible for a defendant to rebut the *prima facie* case because his evidence does not “preponderate enough” to overcome the statistics. Doing so commits the same error as the First Circuit in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), and the Fifth Circuit in *Burdine*, by glossing onto the employer’s burden an additional requirement not intended or allowed by the established tests set out by this Court. In practical effect, no defendant can defend even the most straightforward individual treatment case without also defending its practices across-the-board, regardless of whether those practices bear any relation to the challenged conduct. As stated by Judge Floyd R. Gibson in his dissent in the first Eighth Circuit opinion, *Vaughn, supra*, 620 F.2d at 662,

The Civil Rights Act of 1964 is not thought to have been intended to preserve sinecures for people, regardless of their race, who do not want to perform reasonably satisfactory work. Vaughn’s productivity record was the worst of any of the operators. The Act here is being utilized as a shield to protect and reward substandard performance.

*The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Employee’s Burden Of Proof To Show Pretext After The Prima Facie Case Has Been Rebutted.*

It requires no long discussion to establish that, even after *Burdine* and *Aikens*, there remains some confusion among the Circuits with respect to the third-stage burden in Title VII disparate treatment cases. The problem, quite



simply, is that those Circuits which have traditionally shifted the burden of persuasion to the defendant are now using the "more-likely-than-not" prong of the pretext theories set forth in *Burdine* to find liability. They do so in those cases where, although there is no evidentiary basis for discrediting defendant's articulated reasons, the court is not satisfied that defendant's actions were devoid of discriminatory animus. A few examples of cases on this issue in the various circuits should establish the conflict:

In *Grano v. Department of Development*, 699 F.2d 836 (6th Cir. 1983), the Court of Appeals for the Sixth Circuit held that, at the third or pretext stage, a court should view an employer's articulated reason with "particularly close scrutiny" when the reason is based upon a subjective evaluation by a supervisor of another race than the plaintiff. Subjectiveness, however, is not unlawful *per se*, and the plaintiff may not establish pretext based upon subjectiveness unless the subjective criteria are affirmatively shown to have been used to disguise discriminatory action. *Id.* In *Vaughn*, to the contrary, a perceived lack of objectivity was enough to shift the burden to the defendant to overcome a presumption based upon unrelated statistics.

In *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983), the Court of Appeals for the Tenth Circuit considered carefully the particular circumstances surrounding the allegedly discriminatory employment decision in order to find pretext. While the Court did consider statistical evidence, it was careful to draw an inference only from the evidence directly relevant to that decision, the admitted failure to select minorities for supervisory positions such as that sought by the plaintiff.

The Tenth Circuit's view of *Burdine* is more clearly set forth in *Montgomery v. Yellow Freight System*, 671 F.2d 412 (10th Cir. 1982), in which the plaintiff asserted that the burden was on the defendant to prove that he would have been fired regardless of his race. The Court, relying on

*Burdine*, held that the employee had the ultimate burden, an affirmative one, to show pretext and the defendant was not required to prove the absence of discrimination. The plaintiff also urged that the defendant had failed to show that non-black employees had been treated the same as plaintiff, but the Court held that under *Burdine*, it was "the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *Id.* at 413, quoting *Burdine* at 248. Had the Eighth Circuit applied that standard in the instant case, under the district court's own findings, the plaintiff could not have prevailed, because "no proof was offered to the effect that a white person with a work record comparable to Ms. Vaughn's was kept on the job." *Vaughn, supra*, 523 F.Supp. at 370.

In *Perryman v. Johnson Products Co.*, 698 F.2d 1138 (11th Cir. 1983), the Eleventh Circuit carefully set forth its view of the allocation of burdens after *Burdine*. In its view, the plaintiff may attack defendant's articulated reasons under either of the theories described in *Burdine*, and, if successful, create a new presumption of discriminatory intent that may only be rebutted by a showing by the employer that the adverse action would have been taken in the absence of discriminatory intent. *Id.* at 1142, citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Had the Eighth Circuit applied that test, again defendant would have prevailed, since the district court expressly found that the plaintiff's "burnt wires . . . in fact existed, [and] that production problems were a genuine concern. It seems likely, in fact, that plaintiff's job performance did leave something to be desired, and that defendant was in part legitimately motivated in disqualifying her." *Vaughn, supra*, 523 F. Supp at 371.

"The question in the case, however, is whether race played *any* substantial part in defendant's decision-making." *Vaughn, supra*, 523 F. Supp. at 371. (emphasis the Court's). In affirming, the Court of Appeals interpreted that holding to mean "motivated in substantial

part by her race." *Vaughn, supra*, 702 F.2d at 139. While this language somewhat changes the import of the district court's holding, it nevertheless approves a legal theory of liability contrary to that announced by the Eleventh Circuit.

The Court of Appeals of the District of Columbia would apparently apply a still different burden. *Toney v. Block*, No. 81-2235 (D.C. Cir. April 29, 1983). There, in a case involving a federal employee who had exhausted formal administrative procedures, the plaintiff sought to impose upon the employer the burden to establish by clear and convincing evidence that an unlawful factor was not the determinative one. The Court agreed that this burden would be appropriate in the circumstance where "the plaintiff had established [before an administrative tribunal] that unlawful discrimination had been applied against him in the particular employment decision for which retroactive relief was sought." *Id.* (emphasis the Court's). This was fair in that circumstance because the employee, having already shown discrimination, should not be required "to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor."

"It is fundamentally different, however, to assert that where the existence of unlawful discrimination has been established only within the employment unit at large (or perhaps against the employee in regard to some other aspect of his employment) and has *not* been specifically attributed to the employment decision of which he complains, we will *both* find discrimination to have been a factor *and* find that factor to have been determinative unless the employer makes the extraordinary and difficult *Day v. Matthews* showing. The difference between *Day* and the present case is the difference between making the employer demonstrate (by clear and convincing evidence) that a cause established through normal processes of proof was not an efficacious one, and making him demonstrate that the cause itself did not exist."

*Id.* The Court relied upon the language in *Burdine*, to hold that demonstration of discrimination at large constitutes, for purposes of individual relief, no more than the *prima facie* case that shifts the burden to the defendant to give a justification. Once the defendant produces a reason, the plaintiff may rely upon the generalized proof to prove pretext, but it is plaintiff's burden to prove it, not defendant's burden to prove the opposite. *Id.*

Had the Eighth Circuit utilized even the more difficult standard urged by the plaintiff in *Toney*, defendant nevertheless would have had some opportunity to show that there was no causal link between the "at-large" discrimination and Vaughn's disqualification. Instead, however, the defendant met only the "revolving door" of plaintiff's initial proof, again and again, requiring the defendant to disprove a negative inference that should not have been drawn in the first place.

The final notable example of the third-stage allocation of burdens is the Fifth Circuit's subsequent treatment of the *Burdine* case itself. The Court there held that the articulated reason was clear in the record, and no more was required. *Burdine v. Texas Department of Community Affairs*, 647 F.2d 513 (5th Cir. 1981). The Court's failure to consider pretext in detail must be viewed as a tacit holding that the nature of the evidence produced by the defendant could not be overcome by extrapolation from the *prima facie* evidence, the extent of which this Court had noted in its own decision at footnote 11. If the evidence catalogued by this Court in *Burdine*—primarily failure to utilize objective criteria—was insufficient there, it was in *Vaughn* as well.

A detailed review would establish that the inconsistent application of the third-stage burden in disparate treatment cases is recurrent and obvious at the circuit and district court levels throughout the federal judicial districts. What seemed clear is no longer clear. This Court must now clearly

articulate the proper method for testing pretext in disparate treatment cases, and no case better than this one presents the question so precisely for this Court's review. Because the Court has already passed on the merits of this case with respect to the first two stages of proof, the facts are now clearly developed for a decision which could substantially reduce or eliminate the confusion now clouding the pretext stage. Further, this case clearly presents the issue of whether the *Mt. Healthy* test applies in Title VII disparate treatment cases.

*The Decision Below Conflicts With Other Decisions On The Same Issue Within The Eighth Circuit.*

A party seeking to ascertain the appropriate burdens at stage three, if he were not confused enough by the law in the various circuits, would be hopelessly lost in using the Eighth Circuit as a reference. There is simply no discernable pattern in this Circuit, save its apparent disregard for *Burdine*.<sup>3</sup> Before *Burdine* in *Middleton v. Remington Arms Co.*, 594 F.2d 1210 (8th Cir. 1979), the Eighth Circuit considered it conclusive on the issue of pretext that the plaintiff was able to produce "not one scintilla of evidence" that he was treated any differently than other employees." *Id.* at 1213. Yet in *Vaughn*, both the trial and appeals courts candidly found that there was no such evidence presented by the plaintiff, but found the defendant guilty of unlawful discrimination nonetheless.

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It is notable that, in *Vaughn*, remanded by this Court for consideration in light of *Burdine*, only casual reference was made to that case at all. The District Court, while demanding additional briefs expressly discussing *Burdine*, wasted no more than one sentence and a footnote on consideration of that decision. Neither court considered the effect of this Court's extended discussion of the pretext burdens in *Burdine*, even though both were under a mandate to do so.



In *Johnson v. Bunny Bread Company*, 646 F.2d 1250, 1256 (8th Cir. 1981), the Eighth Circuit considered the appeal of two employees who unsuccessfully alleged discriminatory treatment as to working conditions and discharges. The Court, reflecting a proper distrust for marginally related evidence, "scrutinized closely" the generalized statistics offered to prove pretextual motive, and found that in light of the un rebutted evidence of legitimate reasons for the actions, the statistics were left "with little, if any, probative value." *Id.* at 1255. "Without additional evidence . . . the connection between [these statistics] and [Johnson's] discharge is too attenuated to compel a finding of [discriminatory] motive." *Id.*, citing *Person v. J.S. Alberici Constr. Co.*, 640 F.2d 916, 919 (8th Cir. 1981). The Court then searched the record for "additional evidence" that similarly situated white employees had been treated differently than blacks. Finding none, the Court held that the plaintiffs had failed to meet their third-stage burden.

In *Locke v. Kansas City Power and Light Co.*, 660 F.2d 359 (8th Cir. 1981), the Court again performed an analysis similar to that employed in *Person*, *Johnson* and *Middleton*. In finding pretext, the Court relied upon specific fact-findings related to the employment action in question and the credibility of defendant's articulated reason. There was no such evidence in *Vaughn*. The pattern that had appeared to emerge in pretext cases thus evaporated.

The best example, however, of the split in this Circuit is illustrated by *Vaughn* and the two other cases argued to that same panel on the same day, and decided within two months of each other. The *Vaughn* decision, of course, is before this Court, and its reasoning is set forth in Appendix A hereto. The other cases argued along with *Vaughn* are *Robinson v. Arkansas State Highway Commission*, 698 F.2d 957 (8th Cir. 1983), and *Danzl v. North St. Paul-Maplewood-Oakdale Independent School District No. 622*, No. 82-1688 (8th Cir. May 4, 1983). In *Robinson*, the Court of Appeals

relied upon *Burdine* and *Johnson, supra*, to find that the plaintiff had failed to establish pretext. In so doing, the Court considered carefully the facts surrounding the challenged employment decision. Although the plaintiff asserted strongly that her generalized evidence demonstrated pretext, it is notable that the Court dismissed this argument out-of-hand because she failed to "explain how such evidence demonstrate[d] that her failure to be transferred was racially motivated . . . ." *Id.* at 958, citing *Johnson, supra*, at 1254-55. In other words, there was no causal link between that evidence and the challenged employment decision.

In *Danzl, supra*, the Court reversed the trial court's finding of pretext (on rehearing after remand in light of *Burdine*), relying heavily on the *McDonnell-Burdine* holdings that "[a]t all times the ultimate burden of persuasion that the defendant committed intentional discrimination remains with the plaintiff." *Id.* slip op. at 5. The Court held that, in order to discharge that burden, the plaintiff "need not prove that her sex was the sole reason for the challenged employment decision, but need only prove that sex was a factor in the decision." *Id.* But the key basis for the reversal in *Danzl* was the fact that the defendant's articulated reason for the difference in treatment was never contradicted. "Because the school district provided a reasonable factual explanation that was uncontradicted, we think the district court committed clear error by finding that the school district's proffered reason was pretextual." The same must be said of the defendant's reasons in *Vaughn*, but the result there was strikingly different. Importantly, the defendant in *Danzl* had a history of underrepresentation of women in administrative positions and had obligated itself under a national agreement between the United States Department of Health, Education and Welfare and the Women's Equity Action League to "make a conscious effort to select female administrators." Despite that generalized proof, the Court



"thoroughly searched the record and . . . found nothing that supports the district court's finding of intentional discrimination." *Id.* at 11.

*Danzl* and *Robinson* cannot be factually distinguished from *Vaughn*. If anything, the legitimate business reasons articulated for the challenged employment decision in *Vaughn* were clearer and stronger than in *Robinson* and *Danzl*. There was not even diminishing, much less contradictory proof offered to rebut those reasons. Such a disparity in result, by the same panel of the same Court, makes it impossible for courts or practitioners to determine the requirements of the pretext stage in a disparate treatment case.

*The Decision Below, Besides Its Legal Faults, Is Clearly Erroneous On The Facts And Is Unsupported By Any Relevant Evidence.*

While the foregoing analysis clearly establishes a basis for the granting of this petition, this Court may also grant certiorari and hear a case under its supervisory powers, to right a glaring wrong. Petitioner is aware of the Court's recent pronouncements on the application of the "clearly erroneous" doctrine in Title VII cases, *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982), but justice demands that cases should be decided on the evidence, and not based upon the subjective feelings of the trier-of-fact. The Court of Appeals in *Vaughn* determined that "[t]his is a close case and it may well be that the panel, if sitting as the trial judge, might have found that Westinghouse's proffered reason for plaintiff's disqualification was not pretextual." *Vaughn*, *supra*. 702 F.2d at 139. The Court nevertheless felt constrained by the standard of review set forth in Rule 52(a), Fed. R. Civ. P., to affirm. While the Court expressed a hesitation to disturb the findings and decision of a trial court, it had no hesitation about affirming a decision which disapproved an employer's business decision simply because it did not satisfy the trial court's belief that there

was a better way to arrive at the decision, using "objective" factors.

Judge Gibson, in his dissent in the first appeal, 620 F.2d at 662, urged that Title VII was never intended to require "uniform production standards" or to mandate "how businesses should produce their products. This requirement would result in government supervision of each and every stage of the production process." Petitioner thought that such a criterion for finding liability was foreclosed by *Furnco, supra*, 438 U.S. at 572, which held that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."

The appellate decision was based in part, of course, on that Court's erroneous view of the law, but even under its own legal tests, this case was wrongly decided. The district court found that there was no evidence that Vaughn was verbally abused or harrassed on account of her race or for any other reason; she admittedly did not like the third or "graveyard" shift, and performed poorly there; her supervisor, Mr. Turnage, warned her on five separate occasions during her tenure on his shift that she was not performing satisfactorily and made contemporaneous notes of those conferences. Mr. Turnage tried to motivate her and offered her training opportunities, but he was unable to motivate her or improve her performance for more than a few days at a time. Turnage, in his four years as a supervisor, had disqualified only three employees, Vaughn and two white males; Turnage was apparently unaware of Vaughn's performance on Barzil's shift and limited his consideration solely to her observed performance under his supervision. The trial court found "no reason to disbelieve" any of this testimony, or the documentary evidence supporting it. Further, there was no evidence that similarly situated whites had been treated differently, or that blacks were disqualified more frequently than whites. None of the evidence credited by the court addressed the employment action in dispute.

On such a record, there was simply no evidence to support a finding that *Turnage's* decision—and his was the only decision then in dispute—was based even in part on unlawful racial considerations. As Judge Fagg wrote in dissent,

"Based upon the record, I feel we are obligated to find that Vaughn disliked the late shift, she was under-achieving on the sealex machine, and she was not motivated to improve upon an unsatisfactory performance notwithstanding the wasteful and costly consequences to her company.

In my view, Vaughn failed to meet her burden of persuasion that a discriminatory reason was the basis for her disqualification and transfer to a lower paying job and the district court's ruling to the contrary is clearly erroneous."

*Vaughn, supra*, 702 F.2d at 140-41, (Fagg, J., dissenting). Petitioner is unable to state the case any more succinctly. Westinghouse has been forced to pay tens of thousands of dollars in attorney's fees, costs and backpay to an employee who did not like her job and would not perform it, and who, to this day, still declines to try the job again. Logic and fairness demand a reversal of this result.

## CONCLUSION

The trial court and the Court of Appeals have had ample opportunity to correct this injustice. They have declined to do so. Petitioner earnestly prays that, for the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JAMES W. MOORE\*  
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STUART I. SALTMAN  
*Chief Labor Counsel*  
*Westinghouse Electric*  
*Corporation*

*Attorneys for Petitioners*  
*\*Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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NO. 82-1123

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Christine Vaughn and Marian  
Gee,

Appellees

v.

Westinghouse Electric Corp.,

Appellant

\*  
\*  
\*  
\*  
\* Appeal from the United  
\* States District Court  
\* for the Eastern  
\* District of Arkansas

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Submitted: December 14, 1982

Filed: March 11, 1983

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Before ROSS and FAGG, Circuit Judges, and SCHATZ,  
District Judge.\*

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ROSS, Circuit Judge.

This case is before this Court for the second time on an appeal by the defendant Westinghouse from a decision by Judge Arnold, sitting by designation, again finding Westinghouse liable for a violation of Title VII of the Civil

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\*The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, sitting by designation.

Rights Act of 1964. In the initial proceeding before the trial court, appellee Vaughn prevailed on her claim that she was disqualified as a sealex machine operator because of her race. *Vaughn v. Westinghouse Electric Corp.*, 471 F.Supp. 281 (E.D. Ark. 1979). Westinghouse appealed to this court alleging that the district court misapplied the burden of proof, and that the factual findings were clearly erroneous. This court affirmed the judgment of the trial court. *Vaughn v. Westinghouse Electric Corp.*, 620 F.2d 655 (8th Cir. 1980). On March 9, 1981, the Supreme Court granted defendant's petition for certiorari, summarily vacated the judgment, and remanded the case to this court for further consideration in light of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This court then remanded to the trial court with directions to reconsider in light of *Burdine*. On remand, the trial court held that it erred on the *Burdine* issue but held that, after reviewing the record as a whole, it reaffirmed its finding that Vaughn was disqualified from her job in substantial part because of her race. On appeal Westinghouse alleges that the district court erred in finding that its legitimate nondiscriminatory reason for disqualifying Vaughn was pretextual. We affirm.

Christine Vaughn, a black woman, was hired by Westinghouse on July 13, 1970, as a sealex machine operator, labor-grade-four, at \$2.20 per hour. On November 16, 1970, she was transferred to a second shift position under the supervision of O.D. Brazil and was earning \$2.54 per hour. On January 25, 1971, she was transferred to the third shift due to a reduction in force. She continued as a sealex operator under the supervision of C.T. Turnage and was earning the top wage rate of \$2.69 per hour. On April 19, 1971, she was disqualified as a sealex operator by Turnage and placed on an open labor-grade-one job of bulb-loader earning \$2.45 per hour.

At the time Vaughn was transferred from the second shift to the third shift, Brazil, as her supervisor, was



required to complete an employee evaluation form concerning Vaughn's job performance. At trial, however, *two* forms were found in Vaughn's personnel file. One form was dated January 20, 1971, and stated that the quality and quantity of production were poor, that he would not rehire her for that reason, and that she got along well with others including her supervisors. The second form was dated January 18, 1971, and stated that Vaughn had had previous satisfactory experience as a sealex machine operator under Brazil on the second shift. From these forms, the district court concluded that Vaughn's work under Brazil presented some problems, but not serious enough to label her performance unsatisfactory.

Under Turnage's supervision on the third shift, Vaughn was verbally warned on five occasions that she was having production problems. Turnage made notes of these verbal warnings which were introduced at trial. On April 19, 1971, Vaughn was disqualified from her job as sealex operator. Vaughn disputed that she had any prior warnings of this action, and testified that she felt she was disqualified under orders from the front office for unknown reasons.

The district court held that Vaughn had established a prima facie case of racial discrimination under the rationale of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The court then held that Westinghouse articulated a legitimate nondiscriminatory reason for Vaughn's disqualification: poor production. However, the court found that the proffered reason was pretextual after considering the record as a whole. In its finding of pretext, the district court focused on the following facts: almost all supervisors at Westinghouse are and have been white; most of the labor-grade-four sealex operators in 1971 were white; basically all labor-grade-one bulb-loaders were black; plaintiff Vaughn, according to Brazil, performed satisfactorily on the sealex machine before her transfer to third shift; and that Vaughn had progressively been given pay increases, until, several



months before her disqualification, she had reached the top rate of pay available for a sealex operator. The court then held that even though Vaughn had some production problems, it felt that her disqualification was motivated in substantial part by her race.

This is a close case and it may well be that the panel, if sitting as the trial judge, might have found that Westinghouse's proffered reason for plaintiff's disqualification was not pretextual. However, we may not substitute our views for that of the district court unless we are able to say that the findings of fact in this case are clearly erroneous as is required by FED. R. CIV. P. 52(a). The factual findings of the district court should not be overturned unless the reviewing court is left with the definite conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). We cannot say, after a review of the record, that we are left with a definite conviction that a mistake was committed in the district court's findings of fact. Accordingly, the district court's judgment that Vaughn was unlawfully disqualified from her job as a sealex operator is affirmed.

FAGG, Circuit Judge, dissenting.

I respectfully dissent. I agree with the majority that Vaughn established a prima facie case and that Westinghouse articulated a legitimate, nondiscriminatory reason for Vaughn's disqualification. However, I disagree that the evidence in the record demonstrates that Vaughn met her burden of proving by a preponderance of the evidence that Westinghouse's reason was a pretext for discrimination. See *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 252-53.

The following evidence supports the conclusion that Vaughn's disqualification was not the result of discrimination. The district court found that there was no evidence

that Vaughn was verbally abused or harassed on account of her race or for any other reason. At the time of her disqualification, Vaughn was working the graveyard shift, 11:00 p.m. to 7:00 a.m., under the supervision of Turnage. Vaughn testified that Turnage gave her assistance to help her become a better sealex operator. Near the end of March, Vaughn communicated her dislike of her job to Turnage and said she wanted to bid off. Turnage explained that she could not bid off because she had not been on the job a sufficient length of time and he encouraged her to put more effort into the job she presently held. Turnage was unable to motivate her, he believed she had no interest in the job of sealex machine operator, and the district court found no reason to disbelieve any of his testimony.

Additionally, there is undisputed evidence of Vaughn's poor production. Her burnt wires causing waste were documented by Turnage. As a sealex operator, Vaughn's production was important because a sealex operator paces the production output of a group of six other employees. Turnage warned Vaughn on five separate occasions from March 9, 1971, to April 15, 1971, about her production problems. He discussed with her the fact that her rate of burnt wires was much higher than that of the other sealex operators. Turnage testified that after the warnings Vaughn would have short periods of improvement but that there was no overall improvement.

Turnage disqualified Vaughn on April 19, 1971. At that time he told Vaughn, in the presence of the union shop steward, that her disqualification was due to her obvious dislike for her job, her high number of burnt wires, and her failure to improve her production to a satisfactory level after repeated talks and warnings. Turnage was a supervisor for Westinghouse for four years. During that entire time he disqualified or failed to qualify only three employees, Vaughn and two white males. The record contains no evidence that Turnage was aware of Brazil's prior reports or that he had conferred with Brazil about

Vaughn's work performance. Under the record the finding is inescapable that Turnage's disqualification decision was based on Vaughn's performance on the graveyard shift and was not influenced by Brazil's impression of Vaughn's ability.

The focus of this case is on the graveyard shift and the evidence is one-sided in favor of Westinghouse: Turnage was an objective supervisor; Turnage counted her burnt wires and told her to reduce her waste, but her performance did not improve; Vaughn did not complain that Turnage's production expectations were unreasonable; Vaughn had no complaints with Turnage's administration of the graveyard shift and she did not contend that his criticism of her work was laced with racial overtones; moreover, no proof was offered that a white employee with a work record comparable to Vaughn's was kept on the job. Although the district court noted that Westinghouse had not established production criteria; although Turnage was not asked specifically if Vaughn's race was a factor in his decision; although Vaughn may have been unhappy with the conduct of a supervisor on a different shift; and although Vaughn introduced general statistics; none of this evidence addresses the employment action in dispute. Based upon the record, I feel we are obliged to find that Vaughn disliked the late shift, she was underachieving on the sealex machine, and she was not motivated to improve upon an unsatisfactory performance notwithstanding the wasteful and costly consequences to her company.

In my view Vaughn failed to meet her burden of persuasion that a discriminatory reason was the basis for her disqualification and transfer to a lower paying job and the district court's ruling to the contrary is clearly erroneous. When this case made its initial appearance before the court Judge Floyd R. Gibson filed a dissenting opinion that is equally applicable to the case as it now pends before the court:

These facts are devoid of any connotation whatsoever of racial discrimination. The only discrimination against Vaughn was because of her poor and sloppy work. The Civil Rights Act of 1964 is not thought to have been passed to preserve sinecures for people, regardless of their race, who do not want to perform reasonably satisfactory work. Vaughn's productivity record was the worst of any of the operators. The Act here is being utilized as a shield to protect and reward sub-standard performance.

*Vaughn v. Westinghouse Electric Corp.*, *supra*, 620 F.2d at 662 (Gibson, J., dissenting).

I would reverse.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

CHRISTINE VAUGHN,	)	
Plaintiff	)	
	)	
VS.	)	NO. LR-C-74-215
	)	
WESTINGHOUSE ELECTRIC)		
CORPORATION.	)	
Defendant	)	

OPINION ON REMAND

ARNOLD, Circuit Judge, Sitting by Designation.

When this case was first before the Court, the defendant Westinghouse was found to have unlawfully disqualified the plaintiff Christine Vaughn from her job as a sealex operator at defendant's Little Rock light-bulb plant, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. *Vaughn v. Westinghouse Electric Corp.*, 471 F.Supp. 281 (E.D. Ark. 1979). In an unpublished<sup>1</sup> order this Court explained the rationale for its holding:

Defendant simply failed to articulate a legitimate, nondiscriminatory reason for Ms. Vaughn's disqualification.

*Vaughn v. Westinghouse Electric Corp.*, No. LR-C-74-215 (E.D. Ark., order filed May 23, 1979).

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The text of the relevant portion of the order may be found in *Vaughn v. Westinghouse Electric Corp.*, 620 F.2d 655, 659 (8th Cir. 1980), the opinion of the Court of Appeals affirming this Court's initial decision.

On defendant's appeal the judgment was affirmed. 620 F.2d 655 (8th Cir. 1980). The Court of Appeals, one judge dissenting, held (1) that this Court has not "misapplied the appropriate burden of proof standards," *id.* at 656, and (2) that this Court's findings of fact were not clearly erroneous, *id.* at 656, 660. Defendant then petitioned for review in the Supreme Court. On March 9, 1981, the Supreme Court granted defendant's petition for certiorari, summarily vacated the judgment of the Court of Appeals, and remanded the cause to that Court "for further consideration in light of *Texas Department of Community Affairs v. Burdine*," 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), which had been decided five days earlier. *Westinghouse Electric Corp. v. Vaughn*, 450 U.S. 921, 101 S.Ct. 1504, 67 L.Ed.2d 808 (1981). The Court of Appeals in turn remanded the cause to this Court with directions to reconsider it in light of *Burdine. Vaughn v. Westinghouse Electric Corp.*, 646 F.2d 335 (8th Cir. 1981). Thereafter, this Court held an in-chambers conference with counsel. It was agreed that no new evidence was necessary, and that each side would brief two issues: (1) whether, in light of *Burdine*, this Court erred in its initial holding that defendant had failed to meet its second-stage burden of articulating a legitimate, non-discriminatory reason for disqualifying plaintiff from her job; and (2) whether, if defendant did in fact meet this second-stage burden of production, plaintiff should nevertheless recover because she has, on the whole case, met her burden of persuading the Court by a preponderance of the evidence that her disqualification was motivated at least in part by her race. Briefing was completed on July 21, 1981. I have now read the relevant portions of the transcript, and the case is ready for decision.

## I.

The first of the two questions presented may be disposed of without elaborate discussion. *Burdine* holds that the defendant's burden, once plaintiff makes a *prima facie* case, is one of production only, not of persuasion.



Defendant need only introduce admissible evidence, legally sufficient (if believed) to justify a judgment in its favor, that the reasons for its personnel action were legitimate and nondiscriminatory. Although "the defendant's explanation of its legitimate reasons must be clear and reasonably specific," 101 S.Ct. at 1096, "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 1094 (footnote omitted). Here, defendant introduced evidence, which was admitted without objection, that it disqualified plaintiff because she had too many burned wires. This asserted reason is legitimate and nondiscriminatory. It was error for this Court to require defendant to show by a preponderance of the evidence that it was in fact motivated by plaintiff's poor job performance. See 471 F.Supp. at 286, 289-90.<sup>2</sup> And although this Court thought at the time that the verbs "show," "prove," and "articulate" were roughly interchangeable, the Supreme Court has now unmistakably held otherwise. Plaintiff now concedes as much in her brief. The Court therefore now holds that defendant did articulate a legitimate, nondiscriminatory reason for disqualifying plaintiff as a sealex operator.

## II.

Defendant argues, in an excellent brief, that plaintiff has failed to carry her burden of persuasion on the whole case. It is forcefully pointed out that plaintiff's problems with making production were well-documented; that Clint Turnage, her supervisor at the time of the disqualification, warned her several times that her performance would have to improve; and that the white woman who replaced her at the sealex machine was entitled to the job by virtue of

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2

Compare *Burdine v. Texas Department of Community Affairs*, 647 F.2d 518 (5th Cir. 1981) (on remand, judgment for defendant affirmed; trial court had found no discrimination).

seniority. In addition, defendant correctly states that there was virtually no direct evidence of unlawful motivation on the part of Mr. Turnage, and that no proof was offered to the effect that a white person with a work record comparable to Ms. Vaughn's was kept on the job. If the issue were narrowly confined to evidence bearing directly on the decision to disqualify the plaintiff, there is no question that defendant would prevail.

The Court believes itself obliged, however, to consider the whole record, including those portions of the evidence that may throw indirect light on defendant's conduct. The Court is not called upon to express a generalized judgment about Westinghouse's employment policies. This is only an individual action challenging a single employee's disqualification and transfer to a lesser-paying job. But circumstantial evidence of intent, as well as direct, is relevant and can be persuasive. Direct evidence of discrimination is rare. An individual personnel action can usually be properly judged only if it is placed in the broader context of defendant's actions over a substantial period of time.

This Court's prior opinion described this context in some detail. 471 F.Supp. at 283-86. There is no need to

repeat this discussion here. The findings previously made have been upheld by the Court of Appeals.<sup>3</sup> They are now reaffirmed by this Court. In addition, it is important to note that almost all of defendant's supervisors, including the two men under whom plaintiff worked as a sealex operator, are and have been white; that most of the labor-grade-four sealex operators in 1971, when plaintiff was disqualified, were white (T. 15); that "[b]asically all" the labor-grade-one bulb loaders (the lower-paying job to which plaintiff was demoted) were black (T. 17); that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O.D. Brazil, before her transfer to Mr. Turnage's shift; and that plaintiff had progressively been given pay increases, until, several months before her disqualification, she had reached the top rate of pay available for that work. The Court does not doubt that the burnt wires documented by defendant in fact existed, or that production problems were a genuine concern. It seems likely, in fact, that plaintiff's job performance did leave something to be desired, and that defendant was in part legitimately motivated in disqualifying her.

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3

This Court's prior opinion did not reach the issue of pretext, and neither did the Court of Appeals. But that Court did make the following significant comment:

It should be noted that, if required, much of the evidence used by the district court in finding a *prima facie* case might go to whether the employer's articulated reason is pretextual. *McDonnell Douglas* states the statistical evidence submitted by plaintiffs is helpful in showing pretext. So would testimony of Vaughn and others relating to individual instances of discrimination. Thus the district court in the present case alternatively could have found the reasons articulated by Westinghouse to be legitimate and nondiscriminatory, but based on the statistical evidence, testimony, and lack of objective production standards, the reasons to be a pretext for discrimination.

The question in the case, however, is whether race played *any* substantial part in defendant's decision-making. To decide what motivated someone ten years ago is not an easy task. But on balance the Court is persuaded that plaintiff's race was more likely than not one of the factors that contributed substantially to defendant's decision. If defendant had set a numerical standard of production, communicated it to its employees, and enforced it uniformly, the result might well be otherwise. It did not do so.<sup>4</sup> Turnage did act objectively in the sense of counting and documenting the number of plaintiff's burnt wires, but he never communicated to her any fixed number that she could not exceed (T. 655), nor did he testify as to what that number might have been.<sup>5</sup> The Court finds that plaintiff was disqualified in part because of her race. Defendant's conduct was therefore a violation of Title VII.

### III.

Before final judgment can be entered, the Court must decide what elements or relief are appropriate. When this case was before the Court the first time, plaintiff was

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Defendant argues that the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 803, 93 S.Ct. 1817, 1822, 1814, 36 L.Ed.2d 668 (1973), generally disapproved the distinction between objective and subjective criteria. I do not so read the case. Many employment decisions must be at least partly subjective, and the absence of objective criteria cannot be legally dispositive. But it is one factor to be considered, especially in a production-line situation where employee performance not only can be, but is, quantitatively measured. See *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 (8th Cir. 1981) (trial court properly "took into consideration the subjective decision making of the Company"), pet'n for cert. filed 50 U.S.L. Week 3176 (U.S. Sept. 14, 1981) (No. 81-512).

5

I have read and re-read Mr. Turnage's testimony. (T. 648-70). There is no reason to disbelieve any of it. But at no time did he testify that Ms. Vaughn's race was not a factor in his decision. The omission is unique in Title VII litigation in which I have been involved, so far as I can now recall.

awarded \$1,696.25, representing back pay up to and including May 30, 1979. 471 F.Supp. at 292. This figure must be brought up to date. In addition, the Court at that time declined to order defendant to reinstate plaintiff as a sealex operator immediately, but rather ordered it to allow her to bid on the next available position. It seems that the same measure of relief remains appropriate. In one respect, a change should be made in the form of order previously entered. Paragraph 5 of the judgment enjoined defendant generally from any racial discrimination in employment. The injunction was not limited to disqualifications, or to any particular plant or group of employees. The Court now believes that this order was too broad. This case began as a class action with three named plaintiffs. Class certification was denied, and two of the plaintiffs' complaints were dismissed in their entirety. The third plaintiff, Ms. Vaughn, has prevailed on only one claim of discrimination out of five suggested. See 471 F.Supp. at 288. This claim involved an isolated instance of discrimination that took place ten years ago. In a situation somewhat similar, but involving a defendant which had been found to have discriminated in four different instances, instead of only one, the Court of Appeals indicated "serious doubt as to the appropriateness of this kind of relief." *Taylor v. Teletype Corp.*, *supra*, 648 F.2d at 1136, *vacating on this point* 478 F.Supp. 1227, 1228 (E.D. Ark. 1979). This Court is therefore not disposed to award permanent, broad-ranging injunctive relief against Westinghouse.

Because plaintiff has prevailed on one of her claims, she is entitled, in the Court's discretion, to an award of attorneys' fees.<sup>6</sup> There is no reason not to make such an award. Its amount will of course need to be determined.

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6

While this case was pending on petition for certiorari, plaintiff filed a motion for a fee award. I excused myself, because the motion depended in part on an issue of timeliness, which in turn involved the credibility of one of counsel for plaintiff versus that of one of my law clerks. When certiorari was granted and the judgment in favor of plaintiff vacated, this particular question became moot, and there was no longer any reason for my disqualification.

Plaintiff is directed to file, on or before October 15, 1981, a memorandum, supported by affidavit, setting forth her position as to the appropriate amount of back pay and attorneys' fees. Defendant may have until October 30, 1981, to reply. Entry of judgment will be withheld until all questions of relief are resolved.



C-1

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 82-1123-EA

Christine Vaughn, et al,  
Appellees,

vs.

Westinghouse Electric Corp.,

Appellant.

Appeal from the United States District Court for the  
Eastern District of Arkansas.

This appeal from the United States District Court was  
submitted on the record of the said District Court, briefs of  
the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the  
judgment of the said District Court in this cause be, and the  
same is hereby, affirmed in accordance with the opinion of  
this Court.

March 11, 1983

Total costs of Appellees  
for briefs for recovery from  
Appellant: \$57.00

C-2

(PLEASE PAY COSTS DIRECTLY TO PARTIES  
INVOLVED)

A true copy:

ATTEST:

/s/ Robert D. St. Vrain  
CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT  
4/5/83

## APPENDIX D

WHOLLY AND PARTIALLY OWNED SUBSIDIARIES  
OF WESTINGHOUSE ELECTRIC CORPORATION

Name	Incorporated In	% of Ownership
Adams Elevator Equipment Company	Delaware	100
Ampgard Products, Inc.	Delaware	100
Ascensores Westinghouse, Inc.	Delaware	100
Ateliers de Constructions Electriques de Charleroi, S.A. (ACEC)	Belgium	17.4
Bolting Services, Inc.	California	100
Breakers Incorporated	Delaware	100
Bryloc, Inc.	Delaware	100
CAX, Inc.	Delaware	100
Cebor Construction Corporation	Delaware	100
Circle W Transportation, Inc.	Delaware	100
Commercial Dorve, S.A.	Spain	100
Compagnie des Dispositifs Semi- conducteurs Westinghouse (CDSW) France		81.3
Componentes Electricos de Lamparas S.A. de C.V.	Mexico	100
Componentes Motrices, Inc.	Delaware	100
Computer and Instrumentation de Puerto Rico, Inc.	Delaware	100

## D-2

Consolidated Elevator Co., Inc.	District of Columbia	100
Consolidated Elevator Co., Inc.	Virginia	100
Electric Arc, Inc.	Delaware	100
Electrical Specialty Products Co.	Alabama	100
Elektrocontroles Villares, Ltda.	Brazil	30.0
Eletromar Industria Eletrica Brasileira, S.A.	Brazil	53.0
Eletromar Nordeste, S.A.	Brazil	90.4
Elevator Products Corp.	New Jersey	100
Elliorr Valve Repair Company, Inc.	Texas	100
Energy Systems Installation, Inc.	Delaware	100
Ercole Marelli & Company, S.p.A.	Italy	1.9
Fabricante de Productos Industriales, S.A. de C.V.	Mexico	100
Fortin Industries, Inc.	Delaware	100
Fusibles Westinghouse de Puerto Rico, Inc.	Delaware	100
Galileo Argentina C.I.S.A.	Argentina	40.
Galileo Uruguay, S.A.	Uruguay	91.
Gangloff Corporation	Delaware	100
Gateway Fleet Company	Pennsylvania	100
Grundstuecks-Verwaltungsgesellschaft Genfer Strasse mbH	West Germany	100

## D-3

Half Moon Bay Properties, Inc.	Delaware	100
Half Moon Bay Construction, Inc.	California	100
Ocean Colony Realty, Inc.	California	100
Half Moon Bay Realty, Inc.	California	100
Resources Design, Inc.	California	100
Hittman Nuclear & Development Corporation	Delaware	100
Hittman Transport Services, Inc.	Delaware	100
Hub Electric Company, Inc.	Illinois	100
Hundt & Weber Schaltgerate GmbH	West Germany	100
ICO de Puerto Rico, Inc.	Delaware	100
IVI Manufacturing, Inc.	Delaware	100
Ideal School Supply Company	Illinois	100
Educational Products, Inc.	Delaware	100
Living & Learning (Cambridge), Ltd.	United Kingdom	25.
Industria IEM, S.A. de C.V.	Mexico	9.0
International Filter, Inc.	Delaware	100
Interruptores, Inc.	Delaware	100
Iran-Westinghouse Programs Service Company	Delaware	100
Irwin Industries, Inc.	California	100
JJMR	Delaware	100
LWW, Inc.	Delaware	100
Lamparas Electricas, Inc.	Delaware	100
Longines-Wittnauer, Inc.	Delaware	100
Credit Services, Inc.	New York	100
Wittanuer et Cie., S.A.	Switzerland	100

## D-4

Luxaire, Inc.	Delaware	100
Moncrief Furnace and Air Conditioning Company	Ohio	100
MMCK Corporation	Delaware	100
Materiales Plasticos, Inc.	Delaware	100
Mecanica Pesada, S.A.	Brazil	2.1
Metal Working Systems, Inc.	Delaware	100
Mex Control S.A. de C.V.	Mexico	49.0
Miles Grant Realty Corporation	Florida	100
Miles Grant Water and Sewer Company	Florida	100
Millar Elevator Industries, Inc.	Delaware	100
Minexde Westinghouse, Inc.	Delaware	100
Mitsubishi Nuclear Fuel Co., Ltd.	Japan	34.0
Moorwest, Inc.	Delaware	100
Motores Electricos de Juarez, S.A. de C.V.	Mexico	999.9
Ottermill Limited	United Kingdom	100
Ottermill Switchgear Limited	United Kingdom	100
Westinghouse Electric-MK Limited	United Kingdom	51.0
Ottermill Products Limited	United Kingdom	51.0
Ottermill Switchgear (S.A. (Pty) Ltd.	South Africa	100
Portmetco, Inc.	Delaware	100
Productos Circuitos de Puerto Rico, Inc.	Delaware	100
Productos Electro Mecanicos, Inc.	Delaware	100
Productos Motrices, Inc.	Delaware	100
Productos Motrices, Inc.	Delaware	100



## D-5

Productos Westinghouse, Inc.	Delaware	100
Prorelco de Puerto Rico, Inc.	Delaware	100
Prowest, Inc.	Delaware	100
Schneider S.A.	France	.63
Semiconductores Westinghouse, Inc.	Delaware	100
7-Up Bottling Co., Inc.	Puerto Rico	100
Silectra S.A. de C.V.	Mexico	40.0
Superior-Sterling Company	West Virginia	100
TCOM Corporation	Delaware	100
TCOM Export Corporation	Delaware	100
Thermo King Caribbean, Inc.	Delaware	100
Thermo King Corporation	Delaware	100
Thermo King of Southern California, Inc.	Delaware	100
Thermo King de Puerto Rico, Inc.	Delaware	100
Transformadores, Inc.	Delaware	100
Treasure Lake of North Carolina, Inc.	North Carolina	100
Treasure Lake of Pennsylvania, Inc.	Pennsylvania	100
Treasure Lake Real Estate, Inc.	Pennsylvania	100
Tubos Electronicos Westinghouse, Inc.	Delaware	100
Turtle Creek and Allegheny River Railroad Company (The)	Pennsylvania	100
Tyree Industries Limited	Australia	68.8
Endurance Electric Pty. Limited	Australia	100
Moorebank Properties Pty. Limited	Australia	100
Tranco Electronics Pty. Limited	Australia	100
Tyree Electrical Co. Pty. Limited	Australia	100

## D-6

Tyree Industries (N.Z.) Pty. Limited	New Zealand	100
Tyree Industries (Qld.) Pty. Limited	Australia	100
Tyree Industries (S.A.) Pty. Limited	Australia	100
Tyree Industries (Vic.) Pty. Limited	Australia	100
W.T. Engineering Pty. Limited	Australia	100
Westralian Transformers Pty. Limited	Australia	62.5
Westrans (W.A.) Pty. Limited	Australia	100
Westralian Transformers Pty. Limited	Australia	37.5
Tyree-Power Construction Limited	New Zealand	49.9
Tyree-Power Construction (Auckland) Limited	New Zealand	100
Unimation, Inc.	Delaware	100
United Elevator Corporation	California	100
Vectrol, Inc.	Maryland	100
Motor Control Corporation	California	100
Vektron S.A.	Mexico	24.5
West Valley Nuclear Service Company, Inc.	Delaware	100
Westinghouse Beverage Group, Inc.	Delaware	100
Westinghouse Broadcasting and Cable, Inc.	Indiana	100
CATV Enterprises, Inc.	New York	100
Group W Cable, Inc.	New York	100
ACTIVE SUBSIDIARIES - 11/8/82		
Cable TV General, Inc.	Delaware	80.0
Cablevision Training Centers, Inc.	Missouri	100
El Paso Cablevision, Inc.	Texas	74.67
Filmation Associates	Nevada	80
Focus Cable of Oakland, Inc.	California	80
Grosse Point Cable, Inc.	Michigan	25
Group W Cable of Burnsville/ Egan, Inc.	Minnesota	
Group W Cable of Grapevine, Inc.	Texas	100

## D-7

Group W Cable of Lewisville, Inc.	Texas	100
Group W Cable of Lorain County, Inc.	Ohio	80
Group W Cable of North Central Chicago, Inc.	Illinois	98
Group W Cable of North Central Suburbs, Inc.	Minnesota	100
Group W Cable of Northern Dakota County, Inc.	Minnesota	100
Group W Cable of North Suburbs, Inc.	Minnesota	100
Group W Cable of North West Chicago, Inc.	Illinois	98
Group W Cable of Quad Cities, Inc.	Minnesota	100
Group W Cable of Ramsey, Washington, Inc.	Minnesota	100
Group W Cable of St. Paul, Inc.	Minnesota	80
Kaiser-Teleprompter of Hawaii, Inc.	Nevada	50
Piedmont Cablevision, Inc.	California	80
Shermely Music, Inc.	California	100
Southwest Video Corp. (d/b/a Group W Cable)	Texas	97.3
Spacecast, Inc.	Delaware	100
T & H Associates	Delaware	100
Telcom Cablevision, Inc.	Delaware	80
Teleprompter Cable Services, Inc.	California	100
Teleprompter Communications, Inc.	New York	100
Teleprompter of Clarksburg, Inc. (d/b/a Group W Cable)	West Virginia	100
Teleprompter of Columbia Heights/Hilltip, Inc. (d/b/a Group W Cable)	Minnesota	80
Teleprompter of East San Fernando Valley, Inc.	California	100
Teleprompter of Fairmont, Inc. (d/b/ Group W Cable)	West Virginia	100
Teleprompter of Richardson, Inc.	Texas	100
Teleprompter of St. Bernard, Inc. (d/b/a Group W Cable)	Louisiana	80
Teleprompter of Worcester, Inc.	Massachusetts	80
Wired Music, Inc.	Illinois	100

## INACTIVE SUBSIDIARIES TO BE DISSOLVED—11/8/82

All Towns Cable TV, Inc.	New York	100
Community Cablevision Corporation	New Jersey	100

## D-8

Community Cablevision Corporation	Pennsylvania	100
Community Electronics Systems, Inc.	Delaware	100
Cornwall Co-Ax, Inc. SUB		
of Newburgh	New York	100
Garden State TV Cable Corp. of		
Northfield	New Jersey	100
Group Communications, Inc.	New York	100
Highline Community Antenna Service	Montana	100
Hometown TV, Inc., SUB of		
Newburgh	New York	100
Lake County Cable TV, Inc.	Indiana	100
North Suffolk CATV Systems, Inc.	New York	100
Pinellas CATV Corporation	Delaware	100
PS West	California	100
Suburban Cable Television, Inc.	California	100
SVC Systems, Inc.	Texas	100
Teleprompter Cable Communications		
Corp	Connecticut	100
Teleprompter Hillsborough Cable-		
vision Corp	Delaware	100
Teleprompter International		
Corporation	New York	100
Teleprompter Island Cable TV		
Corporation	New York	100
Teleprompter Massachusetts CATV		
Corporation	Delaware	100
Teleprompter Multiservices		
Corporation	Delaware	100
Teleprompter New Jersey Cable		
Network, Inc.	New Jersey	100
Teleprompter of Berea, Inc.	Ohio	100
Teleprompter of Beverly, Inc.	Massachusetts	100
Teleprompter of Boston, Inc.	Massachusetts	100
Teleprompter of Brockton, Inc.	Massachusetts	100
Teleprompter of Brookline, Inc.	Massachusetts	100
Teleprompter of Brooklyn, Inc.	Delaware	100
Teleprompter of Burlingame, Inc.	California	100
Teleprompter of Campbell County,		
Inc.	Kentucky	100
Teleprompter of Caribou, Inc.	Maine	100
Teleprompter of Chicago		
Heights, Inc.	Illinois	100
Teleprompter of Cicero, Inc.	Illinois	100
Teleprompter of Cincinnati, Inc.	Ohio	100
Teleprompter of Coquille, Inc.	Delaware	100
Teleprompter of the Colony, Inc.	Texas	100

Teleprompter of Danbury, Inc.	Connecticut	100
Teleprompter of Evanston, Inc.	Illinois	100
Teleprompter of Frensdale, Inc.	Michigan	100
Teleprompter of Gardena, Inc.	California	100
Teleprompter of Garden City, Inc.	Michigan	100
Teleprompter of Glendale, Inc.	Arizona	100
Teleprompter of Glen Ellyn, Inc.	Illinois	100
Teleprompter of Great Falls, Inc.	Montana	100
Teleprompter of Harrison, Inc.	New York	100
Teleprompter of Holly Hill, Inc.	Florida	100
Teleprompter of Hudson, Inc.	Massachusetts	100
Teleprompter of Inkster, Inc.	Michigan	100
Teleprompter of La Crosse, Inc.	Wisconsin	100
Teleprompter of Lakeland, Inc.	Florida	100
Teleprompter of Manatee County, Inc.	Florida	100
Teleprompter of Marlborough, Inc.	Massachusetts	100
Teleprompter of Middleburg Heights, Inc.	Ohio	100
Teleprompter of Middletown, Inc.	Connecticut	100
Teleprompter of Millbury, Inc.	Massachusetts	100
Teleprompter of Milpitas, Inc.	California	100
Teleprompter of Missouri, Ind.	Delaware	100
Teleprompter of Mountain View, Inc.	California	100
Teleprompter of Mount Lake Terrace, Inc.	Delaware	100
Teleprompter of Natick, Inc.	Massachusetts	100
Teleprompter of Newton, Inc.	Massachusetts	100
Teleprompter of New Orleans, Inc.	Louisianan	100
Teleprompter of Newport, Inc.	Kentucky	100
Teleprompter of North Olmsted, Inc.	Ohio	100
Teleprompter of Northwest Hennepin County, Inc.	Minnesota	100
Teleprompter of Oakland County, Inc.	Michigan	100
Teleprompter of Oregon, Inc.	Oregon	100
Teleprompter of Oxford, Inc.	Massachusetts	100
Teleprompter of Peabody, Inc.	Massachusetts	100
Teleprompter of Philadelphia, Inc.	Delaware	100
Teleprompter of Pittsburgh, Inc.	Delaware	100
Teleprompter of Portland, Inc.	Oregon	100
Teleprompter of Portsmouth, Inc.	Ohio	100
Teleprompter of Putnam County, Inc.	New York	100
Teleprompter of Queens, Inc.	New York	100
Teleprompter of Quincy, Inc.	Massachusetts	100
Teleprompter of Santa Ana, Inc.	California	100
Teleprompter of Scottsdale, Inc.	Arizona	100

## D-10

Teleprompter of Sheboygan, Inc.	Wisconsin	100
Teleprompter of Southfield, Inc.	Michigan	100
Teleprompter of Southwest Hennepin County, Inc.	Minnesota	100
Teleprompter of Springfield, Inc.	Massachusetts	100
Teleprompter of Taunton, Inc.	Massachusetts	100
Teleprompter of Taylor, Inc.	Michigan	100
Teleprompter of Torrence, Inc.	California	100
Teleprompter of Tucson, Inc.	Arizona	100
Teleprompter of Vancouver, Inc.	Washington	100
Teleprompter of Wakefield, Inc.	Massachusetts	100
Teleprompter of Watertown, Inc.	New York	100
Teleprompter of Westchester, Inc.	New York	100
Teleprompter of Weymouth, Inc.	Massachusetts	100
Teleprompter Pay Television Corporation	New York	100
Theta East, Inc.	California	100
Theta West, Inc.	California	100

## INACTIVE SUBSIDIARIES WITH MINORITY STOCKHOLDERS

Bayou Cablevision Company	Texas	80
Bridgeport Community Antenna TV Co.	Connecticut	95
Saw Mill River Cablevision, Inc.	New York	85
Teleprompter of Avon Lake, Inc.	Ohio	80
Teleprompter of Denver, Inc.	Colorado	80
Teleprompter of Kentucky, Inc.	Kentucky	80
Teleprompter of Milwaukee, Inc.	Wisconsin	80
Teleprompter of Sacramento, Inc.	California	80
Teleprompter of St. Paul, Inc.	Minnesota	80
Teleprompter of Sheffield Lake	Ohio	80
Group W Cable Productions, Inc.	Delaware	100
Home Theater Network, Inc.	Maine	100
Micro-Relay, Inc.	Maryland	100
PM Magazine Program Service, Inc.	Delaware	100
Westinghouse Broadcasting and Cable, Inc. (Cal.)	Delaware	100
Westinghouse Broadcasting and Cable, Inc. (Mass.)	Delaware	100
Westinghouse Broadcasting and Cable, Inc. (Colorado)	Colorado	100
W-F Productions, Inc.	Delaware	100
Westinghouse Canada Inc.	Canada	95.2
B.F. Sturtevant Canada Inc.	Canada	100



## D-11

Electrics (1978) Inc.	Canada	100
Wescan Europe Limited	Ireland	100
Westinghouse Combustion Turbine Services, Inc.	Delaware	100
Westinghouse Communication Services, Inc.	Delaware	100
Westinghouse Communities, Inc.	Delaware	100
Coral Ridge Properties, Inc.	Delaware	100
Coral Highlands Association, Inc.	Florida	100
Coral Ridge Realty Corporation	Florida	100
Coral Ridge Realty Sales, Inc.	Florida	100
Coral Springs, Realty, Inc.	Florida	100
Florida National Properties, Inc.	Florida	100
Highland General Corporation	Florida	100
National Association Management, Inc.	Florida	100
New Community Development Group Corporation	Florida	100
Ocean Mile Association, Inc.	Florida	100
Realty Management Corporation	Florida	100
Royal Continental Hotels Corporation	Florida	100
Westinghouse Communities of Naples, Inc.	Florida	100
The Club at Pelican Bay	Florida	100
Pelican Bay Beach Club, Inc.	Florida	100
Pelican Bay Development, Inc.	Florida	100
Pelican Bay Properties, Inc.	Florida	100
Pelican Bay Racquet Club, Inc.	Florida	100
Pelican Bay Realty, Inc.	Florida	100
Westinghouse Gateway Communities, Inc.	Florida	100
Westinghouse Construction International, Inc.	Delaware	100
Westinghouse Controls, Inc.	Delaware	100
Westinghouse Corporation	Pennsylvania	100
Westinghouse Credit Corporation	Delaware	100
First Hotel Investment Corporation	Delaware	100
First Tanker Leasing Corporation	Delaware	100
Penn Insurance Agency, Inc.	California	100
Westinghouse Leasing Corporation	Delaware	100

## D-12

Westinghouse de Venezuela, S.A.		
(VENWESA)	Venezuela	100
Ascensores Westinghouse, S.A.		
(AWESA)	Venezuela	100
Productos Electricos Westinghouse,		
S.A. (PEWESA)	Venezuela	100
Servicios Industriales Westinghouse,		
C.A. (SERWESTCA)	Venezuela	100
Transformadores de Distribucion		
Trade, S.A. (TRADESA)	Venezuela	40.0
Tubos Westinghouse C.A.		
(TUWESTCA)	Venezuela	100
Westinghouse Electro Metalurgicas		
C.A. (WEMCA)	Venezuela	78.8
Luz-A-Tec Sistemas Integrados		
C.A.	Venezuela	100
Proyectos Westinghouse C.A.		
(PROWECA)	Venezuela	100
Industrias Electronicas, S.A.		
(INDELEC)	Venezuela	20.0
Westinghouse Defense International		
Limited	Australia	100
Westinghouse Defense International		
Marketing Company	Delaware	100
Westinghouse do Brasil S.A. (WEBSA)	Brazil	100
CMW Sistemas, Ltda. (CMWS)	Brazil	49.0
CMW Equipamentos, Ltda. (CMWE)	Brazil	49.0
Westinghouse do Nordeste S.A.	Brazil	100
Westinghouse Electric S.A. (WELSA)	Switzerland	100
Westinghouse Controlmatic GmbH	West Germany	100
Sestinghouse Electric GmbH		
(WELGES)	West Germany	100
Westinghouse Electric (Asia-Pacific)		
Holdings, Ltd. (WEAPHL)	Singapore	100
Westinghouse Electric (Singapore)		
Ltd.	Singapore	100
Industry Services Company of		
Saudi Arabia, Ltd. (ISCOSA)	Saudi Arabia	75.0
Galileo Argentina, C.I.S.A.	Argentina	17.0
Galileo Uruguay, S.A.	Uruguay	91.7
Westinghouse Monitor A.B.	Sweden	100

Sterwech, B.V.	Netherlands	100
Verwarmings - en Technische Installatie Maatschappij B.V.	Netherlands	100
Westinghouse Electrotechniek en Instrumentatie B.V.	Netherlands	100
Controle et Applications	Netherlands	100
Thermo King do Brasil Ltda.	Brazil	100
Westinghouse, S.A. (WESA)	Spain	66.7
Westinghouse Proyectos Electricos, S.A. (WEPESA)	Spain	30.3
Westinghouse Asia Controls Corp.	Philippines	79.0
Westinghouse Electric France, S.A.	France	100
Westinghouse Electric GmbH S.A.R.L. (WEG)	Switzerland	100
Ercole Marelli & Company, S.p.A.	Italy	4.0
Westinghouse Irish Holdings Limited	Ireland	100
CDSW Ireland Limited	Ireland	83.3
Westinghouse Electric Sales and Services Limited	Ireland	100
Westinghouse Electric Ireland Limited	Ireland	100
Westinghouse Electric Manufacturing Company Limited	Ireland	100
Westinghouse Electric, S.p.A. (WESPA)	Italy	100
Westinghouse Thermo King, GmbH	Switzerland	100
Westinghouse Trading Company Ltd.	Switzerland	100
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)	Saudi Arabia	60.0
Westinghouse International Services, S.A. (WISSA)	Belgium	100
IEM S.A.	Mexico	23.7
Mex Control, S.A. de C.V.	Mexico	51.0
Silectra, S.A. de C.V.	Mexico	60.0
Industria IEM, S.A. de C.V.	Mexico	91.0
Wexico Systems and Services, Ltd.	Saudi Arabia	40.0
Westinghouse Electric (Japan) K.K.	Japan	100
China Industry Services Co., Ltd	Taiwan	75.0
Transformadores TPL S.A.	Colombia	42.3
Westinghouse Saudi Arabia Ltd. (WSAL)	Saudia Arabia	90.0
Westinghouse Electric (China) S.A., Zug (WECSA)	Switzerland	100
Metzenauer & Jung BmgH	West Germany	95.0

## D-14

Norddeutsche Elektrotechnische Werke Metzenauer & Jung GmbH	West Germany	100
Metzenauer & Jung BV	Netherlands	100
Metzenauer & Jung Ltd.	United Kingdom	100
Electro - Fanal S.A.	Brazil	65.0
Westinghouse Electric Australia Holdings Limited	Australia	100
Cemac Westinghouse Pty. Ltd.	Australia	50.0
Westinghouse Electric Australasia Limited (WEAL)	Australia	100
Standard-Waygood of S.A. Limited	Australia	100
Westinghouse Electric Company, S.A. (WECOSA)	Delaware	100
Westinghouse do Brasil Servicos Ltda. (WEBRA)	Brazil	100
Westinghouse Electrid Europe S.A. (WEESA)	Belgium	100
Westinghouse Electric Export Corporation	Delaware	100
Westinghouse Electric Research and Engineering for Atomic Systems, Inc.	Delaware	100
Westinghouse Electrique Europe, S.A.	France	100
Westinghouse Hanford Company	Delaware	100
Westinghouse Industry Products International Company, Inc.	Delaware	100
Westinghouse Industry Services International Company, Inc. (WISICO)	Delaware	100
Westinghouse Industry Services Asia Private Limited	Singapore	100
Westinghouse Saudi Arabia Ltd. (WSAL)	Saudi Arabia	10.
Westinghouse International Atomic Power Co. S.A. (WIAPCO)	Switzerland	100

## D-15

Westinghouse International Power Systems Company, Inc. (WIPSCO)	Delaware	100
Westinghouse Sistemas Electricos Ltda. (WSEL)	Brazil	100
Westinghouse International Projects Company	Delaware	100
Westinghouse International Service Company, Limited	Delaware	100
Westinghouse International Support Services, Inc.	Delaware	100
Westinghouse International Technology Corporation	Delaware	100
Westinghouse (Jamaica) Ltd.	Jamaica	51.
Westinghouse Learning Corporation	Delaware	100
Linguaphone Institute, Inc.	Delaware	100
Linguaphone Institute (Canada) Ltd.	Canada	100
Linguaphone Institute, Ltd.	United Kingdom	100
Copperfield Cases Limited	United Kingdom	100
Interlang Limited	United Kingdom	100
International Catalogues, Ltd.	United Kingdom	100
International Catalogues (Hong Kong) Ltd.	United Kingdom	100
International Gramophone Co. Ltd.	United Kingdom	100
Language Tuition Centre, Ltd.	United Kingdom	100
Linguaphone Institute (Japan) Ltd.	Hong Kong	100
Linguaphone Sprachkurse GmbH	West Germany	100
L.T.C. Translation Ltd.	United Kingdom	100
Recordiogram Ltd.	United Kingdom	100
Schwartz Language Tuition Centre, Ltd.	United Kingdom	100
Sonodisc Ltd.	United Kingdom	100
Westinghouse Management Services, Inc.	Delaware	100
Westinghouse Management Systems, S.A.	France	100
Westinghouse (New Zealand) Limited	New Zealand	100
Westinghouse Nuclear International, Inc.	Delaware	100
Westinghouse Nuclear Espanola, Inc.	Delaware	100

## D-16

Westinghouse Nuclear Japan, Inc.	Delaware	100
Westinghouse Overseas Service Corporation	Delaware	100
Westinghouse Pension Investments Corporation	Delaware	100
Westinghouse Pipeline Company	Delaware	100
Westinghouse Proyectos Electricos, S.A. (WEPESA)	Spain	40.
Westinghouse, S.A.	Spain	11.
Westinghouse Scandinavia A.B. (WESCAN)	Sweden	100
Westinghouse Sistemas Industriais Ltda. (WSIL)	Brazil	100
Westinghouse-Sturtevant de Puerto Rico, Inc.	Delaware	100
Westinghouse Technical Services Corporation	Delaware	100
Westinghouse Thermo King, S.A.	Belgium	100
Westinghouse Transport Leasing Corporation	Delaware	100
Westinghouse World Investment Corporation	Delaware	100
Ateliers de Constructions Electriques de Charleroi S.A. (ACEC)	Belgium	30.
Galileo Argentina, C.I.S.A.	Argentina	34.
Galileo Uruguay, S.A.	Uruguay	91.
IEM S.A.	Mexico	19.
Mex Control, S.A. de C.V.	Mexico	51.
Silectra, S.A. de C.V.	Mexico	60.
Industria IEM, S.A. de C.V.	Mexico	91.
Wyoming Mineral Corporation	Delaware	100



## ACRONYMS

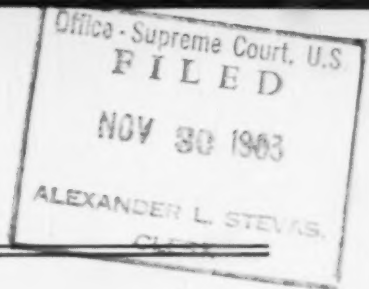
ACEC	- Ateliers de Constructions Electriques de Charleroi S.A.
AWESA	- Ascensores Westinghouse, S.A.
CDSW	- Compagnie des Dispositifs Semiconducteurs Westinghouse
CMWE	- CMW Equipamentos, Ltda.
CMWS	- CMW Sistemas, Ltda.
INDELEC	- Industrias Electronicas, S.A.
ISCOSA	- Industry Services Company of Saudi Arabia, Ltd.
PEWESA	- Productos Electricos Westinghouse, S.A.
PROWECA	- Proyectos Westinghouse C.A.
SERWESTCA	- Servicios Industriales Westinghouse, C.A.
TRADESA	- Transformadores de Distribucion Trade, S.A.
TUWESTCA	- Tubos Westinghouse C.A.
VENWESA	- Westinghouse de Venezuela, S.A.
WBC	- Westinghouse Broadcasting and Cable, Inc.
WCC	- Westinghouse Credit Corporation
WEAL	- Westinghouse Electric Australasia Limited
WEBRA	- Westinghouse do Brasil Servicos Ltda.
WEBSA	- Westinghouse do Brasil S.A.
WECOSA	- Westinghouse Electric Company, S.A.
WEESA	- Westinghouse Electric Europe S.A.
WELGES	- Westinghouse Electric GmbH
WELSA	- Westinghouse Electric S.A.
WEMCA	- Westinghouse Electro Metalurgicas C.A.
WEPESA	- Westinghouse Proyectos Electricos, S.A.
WESA	- Westinghouse, S.A.
WESCOSA	- Westinghouse Electric Supply Company of Saudi Arabia
WESPA	- Westinghouse Electric, S.p.A.
WIAPCO	- Westinghouse International Atomic Power Co. S.A.
WIPCO	- Westinghouse International Projects Company
WISPCO	- Westinghouse International Power Systems Company, Inc.
WISC	- Westinghouse International Service Company, Limited
WISICO	- Westinghouse Industry Services International Company, Inc.
WISSA	- Westinghouse International Services, S.A.
WITCORP	- Westinghouse International Technology Corporation
WNI	- Westinghouse Nuclear International, Inc.
WOSCO	- Westinghouse Overseas Service Corporation

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WSAL  
WSEL  
WSIL

- Westinghouse Saudi Arabia Ltd.
- Westinghouse Sistemas Electricos Ltda.
- Westinghouse Sistemas Industriais Ltda.

No. 82-2042



**In the  
Supreme Court of the United States**

October Term, 1983

Westinghouse Electric Corporation,  
*Petitioner,*

*V.*

Christine Vaughn,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED JUNE 8, 1983  
CERTIORARI GRANTED OCTOBER 17, 1983

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No. 82-2042

In the  
**Supreme Court of the United States**

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October Term, 1983

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Westinghouse Electric Corporation,  
*Petitioner,*

V.

Christine Vaughn,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JOINT APPENDIX

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CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES

July 16, 1974—Complaint filed [in United States District Court for Eastern District of Arkansas, Western Division]. Summons Issued and Handed to Marshal for Service Allowing Defendants 20 days in which to Answer.

September 3, 1974—Answer of Westinghouse Electric Corporation; prayer that complaint be dismissed.

April 17, 1979—Pre-Trial Stipulation.

April 24, 1979—Trial to Court before Judge Arnold.

May, 10, 1979—Opinion (Arnold) that memorandum should be filed on or before May 20, 1979 and defendant



should reply on or before June 1, 1979; entered May 10, 1979.

May 14, 1979—Motion for New Findings of Fact on behalf of defendant; Brief in Support.

June 13, 1979—Supplemental Findings of Fact and Conclusions of Law (Arnold); entered June 13, 1979.

June 13, 1979—Judgment (Arnold) that complaints of Marion Gee and Glenda Crutcher be dismissed with prejudice; That Christine Vaughn have and recover from defendant Westinghouse Electric judgment in the amount of \$1,696.25 representing backpay to and including May 30, 1979; That Westinghouse be ordered to permit Vaughn to bid on the next available sealex machine operator's job; That Westinghouse are enjoined and restrained from racial discrimination; That in addition to monetary award herein, plaintiff recover judgment in the amount of her costs extended with interest of 10%; entered June 13, 1979.

July 3, 1979—Notice of Appeal by defendant Westinghouse Electric corporation from judgment entered June 13, 1979.

June 9, 1980—Opinion [Court of Appeals for the Eighth Circuit].

June 9, 1980—Mandate [Court of Appeals for the Eighth Circuit], judgment is affirmed; costs taxes in favor of appellees in the amount of \$70.00.

September 15, 1980—Notice of Filing Petition for Certiorari with Supreme Court.

April 20, 1981—Order (Supreme Court) judgment of Court of Appeals is vacated and remanded to the Court of Appeals for further consideration.

April 23, 1981 — Order [Court of Appeals for the Eighth Circuit] case is remanded to district court for further proceedings.

September 30, 1981 — Opinion (Arnold) on remand; plaintiff is entitled to an award of attorney's fees, amount will need to be determined. Plaintiff is directed to file by October 15, 1981 a memorandum and affidavit as to her belief of appropriate amount of backpay and attorneys fees. Defendant has to October 30, 1981 to reply. Entry of judgment will be withheld until all questions are resolved (entered on docket October 1, 1981).

November 25, 1981 — Opinion (Arnold) on attorneys' fees; plaintiff is awarded attorneys' fees. Amounts as listed are reasonable and judgment will be entered accordingly (entered on docket November 25, 1981).

November 25, 1981 — Judgment (Arnold) entered in favor of plaintiff in the sum of \$1,696.25 with interest at 10% per annum. Plaintiff shall recover the sum representing the difference between her actual earnings and what she would have earned beginning on June 1, 1979 and ending on date when plaintiff is reinstated or offered reinstatement. Defendant is ordered to permit the plaintiff to bid on the next available job; they are enjoined and restrained from failing or discriminating against plaintiff. Defendant is declared to have violated Title VII of the Civil Rights Act of 1964. Plaintiff will recover judgment in the amount of \$1,087.25 for costs; \$5,648.00 for attorney Z. Crutcher; \$7,332 for attorney J. Walker; and \$2,750.00 for attorney C. Murphy. All judgments shall bear interest at the rate of 10% per annum. (Entered on docket November 25, 1981).

December 4, 1981 — Motion to amend findings of fact and judgment.

December 22, 1981 — Order (Arnold) defendant's motion for amended findings of fact and judgment is granted; an amended judgment is being entered accordingly. (Entered on docket December 22, 1981).

December 22, 1981 — Amended Judgment (Arnold) Paragraphs 2 and 3 are amended to read as follows: No. 2 in addition to money judgment, plaintiff shall have the amount of \$29.46 representing back pay from June 1, 1979 to October 12, 1979 with interest at 10% per annum; No. 3 defendant having permitted plaintiff to bid on available job, defendant is not further obligated to offer said job to plaintiff. (Entered on docket December 22, 1981)

January 20, 1982 — Notice of Appeal by defendant from judgment and amended judgment.

April 7, 1983 — Opinion [Court of Appeals for the Eighth Circuit].

April 7, 1983 — Mandate [Court of Appeals for the Eighth Circuit] judgment is affirmed; Costs awarded to plaintiff appellee in the sum of \$57.00.

April 27, 1983 — Order [Court of Appeals for the Eighth Circuit] plaintiff/appellee's are awarded \$7,275.00 in attorneys fees.

May 18, 1983 — Order [Court of Appeals for the Eighth Circuit] appellee's motion for reconsideration of order of April 25, 1983 is denied.

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

CHRISTINE VAUGHN AND  
MARION GEE ..... *PLAINTIFFS,*

V.                      No. LR 74-C-215

WESTINGHOUSE ELECTRIC CORPORATION,  
INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO,  
LOCAL 1136 INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL  
WORKERS, ..... *DEFENDANTS.*

C O M P L A I N T

I. JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(4), and 42 U.S.C. §2000 (e) 5 (f), being part of Title VII of the act known as the Civil Rights Act of 1964, 42 U.S.C. §2000 (e), *et seq.* The Court is asked to secure protection of and to redress the deprivation of rights secured by 42 U.S.C. §2000 (e), *et seq.*, providing for injunctive and other relief against sex and race discrimination in employment.

Jurisdiction is also invoked pursuant to 28 U.S.C. §§1343 (4) and 2201 and 2202 and 42 U.S.C. §1981 and §1983 providing for a declaratory judgment and providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

II. NATURE OF THE CLAIM

This is a proceeding for a declaratory judgment declaring the plaintiffs' rights; for an award of monetary damages

due the plaintiffs and the classes they represent as a result of their having been assigned to lower paying jobs than those to which white persons and men were assigned; and for a permanent injunction restraining defendants from maintaining policies, practices, customs and usages of: (a) discriminating against black persons as a class because of their race and color with respect to hiring, promotion, compensation, terms, conditions, and other privileges of employment; (b) limiting, segregating and classifying employees in ways which deprive black persons as a class of equal employment opportunity on the basis of their race and color; (c) demoting, dismissing, laying off, and refusing to promote black persons because of their race; (d) discriminating against women as a class because of their sex with respect to hiring, promotion, compensation, job classification, terms, conditions, and other privileges of employment; (e) limiting, segregating, and classifying employees of defendant in ways which deprive women as a class of equal employment opportunity on the basis of their sex; and, (f) demoting, dismissing, laying off, and refusing to promote women because of their sex.

### III. CLASS ACTION

Plaintiffs bring this action on their own behalf and on behalf of all employees similarly situated to the individual plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure, section 23 (a) and 23 (b). Plaintiffs represent the class of black persons who are employed, have been employed, have sought employment, and might seek employment by the defendant, Westinghouse Corporation, and who have been, continue to be, and may in the future be adversely affected by the practices complained of herein. Plaintiffs also represent the class of women who are employed, have been employed, have sought employment and might seek employment by the same defendant and who have been, continue to be and may in the future be adversely affected by the practices complained of herein. Plaintiffs

represent the class of blacks and women who have not been adequately or fairly represented by defendant labor organizations. Defendants have acted and refused to act on grounds generally applicable to the class represented. There are common questions of law and fact affecting the rights of members of the classes, whose members are so numerous as to make it impracticable to bring them all before the Court. The claim of plaintiffs are typical of those of the classes. Common relief is sought. Final injunctive relief is, therefore, appropriate in favor of the plaintiffs and of both classes. Plaintiffs fairly and adequately protects the interests of the classes.

#### IV. PLAINTIFF

The named plaintiffs are black, female employees of the defendant corporation at their Little Rock plant and members of defendant unions. They each have filed charges of discrimination with the Equal Employment Opportunity Commission and have received notice of their right to sue, copies of which are attached hereto and marked Exhibit A and B.

#### V. DEFENDANTS

A. The defendant, Westinghouse Corporation, is a foreign corporation doing business in Little Rock, Arkansas, and has offices and plants throughout the United States. Defendant Westinghouse is an employer within the meaning of 42 U.S.C. 2000 (e) (b).

B. Defendants International Brotherhood of Electrical Workers and its Local 1136 (IBEW) are the exclusive certified collective bargaining representatives of the employees of defendant Westinghouse at its Little Rock facility. They are Labor Organizations within the meaning of 42 U.S.C. §2000 (e) (d).



## VI. CLAIM FOR RELIEF

The defendants have discriminated and continue to discriminate against the plaintiffs and the classes they represent on the basis of race, color, and sex. Their acts, practices, policies, and customs of discrimination include, but are not limited to, the specific instances enumerated below.

A. The defendant maintains and has historically maintained a policy and practice of limiting the employment opportunity of black persons by discriminating against them in initial hiring process.

B. The defendant maintains and has historically maintained racial classifications for certain job assignments, whereby some jobs and some departments, especially better-paying jobs, are limited to white employees and some were historically limited to blacks which has the present effect of concentrating blacks in low-paying and/or menial jobs.

C. The defendant maintains and has historically maintained a practice of discriminating against black employees in promotional opportunities. Assignments to supervisory, professional, managerial and higher paying positions are made in a discriminatory manner.

D. The defendant fails to provide fair and equal training to blacks who are given promotions and transfers. This failure to provide adequate training has the effect of causing the disqualification of blacks from higher-paying jobs and promotional opportunities.

E. The defendant maintains and has historically maintained a policy and practice of limiting the employment opportunity of women by discriminating against them in the initial hiring process.

F. The defendant maintains and has historically maintained classifications of certain job assignments whereby

some jobs are identifiable as "women's jobs" and some as "men's jobs".

G. On or about April 6, 1973, defendant Westinghouse disqualified plaintiff Gee from a higher paying position for which she was qualified on the basis of race; and on or about the same day defendant unions failed to accord fair and equal representation to plaintiff Gee by urging her to withdraw a grievance she had filed over the disqualification.

H. Defendant Westinghouse refused to give plaintiff Vaughn the same training on a higher paying position as they gave to white employees.

I. Defendants discriminated and continue to discriminate against plaintiffs and the classes they represent with regard to pay and conditions or employment based upon her sex and race.

J. Defendant Westinghouse engages in conduct causing female employees to suffer unequal and inferior conditions of employment in that female employees do not enjoy equal pay and advancement opportunities, including supervisory and managerial opportunities as are enjoyed by male employees.

K. Defendant unions discriminate against blacks by refusing to accord them fair and equal representation.

## VII. RELIEF

Plaintiffs and the classes they represent have no adequate remedy at law to redress the wrongs alleged. Plaintiffs and the represented classes are now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, customs and usages as set forth herein.

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Grant plaintiffs and the classes they represent a declaratory judgment that the actions of defendants complained of herein violate the rights of plaintiffs guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1983.

B. Grant plaintiffs and the classes they represent a permanent injunction prohibiting the defendants, their agents, successors, employees, attorneys and those acting in concert with them from engaging in the policies and practices complained of herein in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981 and 1983.

C. Grant plaintiffs and the classes they represent job transfers, promotions, job reclassifications and employment as are necessary, just and proper.

D. Order defendants to constitute an affirmative action program which operates to recruit blacks and women in all positions and which will insure fair and equal treatment to all black and women employees.

E. Order the institution of revised job assignment practices which will redress defendants' past discrimination against plaintiff and ensure that it does not recur in the future.

Grant plaintiffs and the classes they represent back pay and front pay which they would have earned from their date of hire to the date they are reclassified into jobs and paid wages identical to those paid male employees and white employees for equal work, and from their date of hire to the date when they reach job levels and salary scales they would have enjoyed if they had not previously been

subjected to discriminatory treatment in job classifications, hiring, and promotion, together with loss of overtime earnings, premium pay and interests.

G. Order defendants to represent black persons fairly and equally with whites.

H. Award plaintiffs and the classes they represent the costs of their action together with reasonable attorneys' fees as provided in §706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k).

I. Grant plaintiffs and the classes they represent such other relief as may be necessary and proper.

# EXHIBIT A

New Orleans District Office  
Equal Employment Opportunity Commission  
333 St. Charles Street  
New Orleans, Louisiana 70130

CERTIFIED MAIL 939403  
RETURN RECEIPT REQUESTED

April 17, 1974

In Reply Refer to:

Christine Vaughn  
1804 Johnson Street  
Little Rock, Arkansas

Christine Vaughn  
vs.  
Westinghouse Corporation

## NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

In Case No. TNO 3 0437 before the Equal Employment Opportunity Commission, United States Government,

YOU ARE HEREBY NOTIFIED THAT:

WHEREAS, this Commission has not filed a Civil Action with respect to your charge as provided by Section

706 (F) (1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1964), and as amended by the Equal Employment Act of 1972 (Public Law 92-261) (1972); and

WHEREAS, this Commission has not entered into a conciliation agreement to which you are a party;

THEREFORE, pursuant to Section 706 (F) of Title VII, you are hereby notified that you may, *within ninety (90) days of receipt of this letter*, file a law suit in the United State District Court nearest to the place where the alleged discrimination occurred.

If you are not represented by counsel and you are unable to obtain counsel the Court is authorized, in its discretion, to appoint an attorney to represent you and to permit the commencement of suit without payment of fees, costs or security. This NOTICE should be taken to the Clerk of the Federal District Court if you need such assistance.

You should be aware, however, that *your failure to file suit within the 90-day period* may cause you to lose the right to seek judicial relief against the Respondent. Should you decide to sue, please have your attorney complete the enclosed postcards as soon as possible.

Please feel free to contact the Commission if you have further questions on this matter.

Sincerely yours,

/s/Glenn P. Clasen  
Glenn P. Clasen  
District Director

cc: Westinghouse Electric Corporation  
Incandescent Lamp Division  
Roosevelt at Woodrow  
Little Rock, Arkansas 72206

C

Local 1136 International Brotherhood  
Electrical Workers  
c/o Westinghouse Electric Corporation  
Incandescent Lamp Division  
Roosevelt at Woodrow  
Little Rock, Arkansas 72206

(Title omitted in printing)

**ANSWER OF WESTINGHOUSE  
ELECTRIC CORPORATION**

For its answer to the complaint of the plaintiffs,  
defendant Westinghouse Electric Corporation:

**I.**

States that the allegations of Paragraph I are jurisdictional and as such require no answer. However, it is denied that the statutes cited bestow jurisdiction in this case and to the extent that such allegations imply that Westinghouse Electric Corporation has engaged in any practices violative of the statutes referred to, they are denied.

**II.**

Denies that the plaintiffs or any member of the classes they purport to represent have been discriminated against on account of their race or sex or that they are entitled to any declaratory, injunctive or monetary relief or damages as alleged.

**III.**

Admits that the plaintiffs purport to bring this action on behalf of certain classes of individuals but denies that this action can properly be so maintained pursuant to Sections 23(a) and 23(b) of the Federal Rules of Civil



Procedure or the plaintiffs or the purported classes are entitled to any injunctive relief.

IV.

Admits the allegations in Paragraph IV.

V.

Admits the allegations in Paragraph V.

VI.

Denies that it has engaged in the discriminatory employment policies, practices, classifications, and conditions alleged in sub-paragraphs A., B., C., D., E., F., I., and J.

Admits the allegations in sub-paragraph G. that plaintiff Gee on or about April 2, 1973, was disqualified for a higher paying position as a mount inspector coil feeder after a trial period in this job, but states that her disqualification was for lawful reasons and not on account of her race, and, therefore, denies the allegations of sub-paragraph G. as to it.

Denies the allegations in sub-paragraph H. that it ever refused to give plaintiff Vaughn the same training on a higher paying position as given to white employees and further states that it has no knowledge of any request by plaintiff Vaughn for training on a higher paying position which she was refused.

VII.

Denies the allegations of paragraph VII.

## VIII.

Except to the extent specifically admitted herein, denies each and every material allegation contained in the complaint.

## IX.

States that insofar as the Complaint seeks an award of backpay and front pay on behalf of the classes which the plaintiffs purport to represent, it fails to state a claim for which relief may be granted.

## X.

States that defendant Westinghouse Electric Corporation is firmly committed to a policy of equal employment opportunity for all of its employees and applicants for employment without regard to race, color or sex, that they have affirmatively implemented action to afford equal employment opportunity to all employees and applicants for employment and that Westinghouse Electric Corporation does not in any manner discriminate on the basis of race, color or sex in the employment practices, policies, classifications, conditions, customs and usages at its plant in Little Rock, Arkansas.

## XI.

Denies that the plaintiffs are entitled to the relief specified in the prayer of their complaint.

WHEREFORE, defendant Westinghouse Electric Corporation prays that the Complaint be dismissed in its entirety, for its costs herein expended, a reasonable attorneys fee, and all other proper relief to which it may be entitled.

(Signature of counsel and certificate of service omitted).

(Title omitted in printing).

## PRE-TRIAL ORDER

A pre-trial conference was held in this case in Little Rock, Arkansas on Friday, March 23, 1979, and IT IS HEREBY ORDERED that:

This case is set for trial to the Court on Tuesday, April 24, 1979, at 9:30 a.m.

The motion of the defendant unions for summary judgment is denied.

Westinghouse's motion to deny class certification is granted, and no class is certified at this time.

The allegations of sex discrimination in violation of 42 U.S.C. §1981 are dismissed, and the §1983 allegations are dismissed in their entirety.

Leave of Court is granted for Louis Cook to intervene should he choose to do so.

Counsel will submit a pre-trial stipulation in compliance with Rule 9 of the local rules of this Court, together with witness and exhibit lists by April 17, 1979.

Dated this 23rd day of March, 1979.

/s/Richard S. Arnold  
RICHARD S. ARNOLD,  
United States District Judge.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 3-26-79 by DT.

(Title omitted in printing)

## PRE-TRIAL STIPULATION

Come now, Christine Vaughn, Marian Gee, Glenda Crutcher, plaintiffs, International Brotherhood of Electrical Workers, AFL-CIO, Local 1136, International Brotherhood of Electrical Workers, and Westinghouse Electric Corporation, defendants, and through their respective counsel of record and pursuant to Local Rule 9 of this Court do hereby stipulate as follows:

### I.

## STATEMENT OF THE CASE

This is a consolidation action by two former black female employees and one currently employed black female employee alleging that Westinghouse discriminated against them individually and as a class in their employment on account of their race or sex. The plaintiffs individually contend that they were either disqualified or otherwise reduced in job grade on account of their race, denied promotional opportunities on account of their race, and verbally abused or harassed on account of their race. Plaintiff Glenda Crutcher additionally contends that she was discharged on account of her race. Plaintiffs Vaughn and Gee contend that the Unions discriminated against them on account of their race by refusing to accord them fair and equal representation in the processing of certain alleged grievances stemming from their employment.

This Court granted Westinghouse's motion to deny class certification and denied all of the plaintiffs' allegations of class discrimination against Westinghouse and the Unions by order dated March 26, 1979. The plaintiffs' individual claims of discrimination are grounded upon the Civil Rights Act of 1964, 42 U.S.C. §2000e and the Civil Rights Act of 1866, 42 U.S.C. §1981. This Court has also denied plaintiffs' claims based on 42 U.S.C. §1983 in their

entirety and their claims of sex discrimination based on 42 U.S.C. §1981 by its March 26, 1979 order.

Defendant Westinghouse has denied that it has discriminated against the plaintiffs on account of their race or sex and contends that the employment action it took with respect to the plaintiffs was based on just cause and not for discriminatory reasons. Defendant Unions have also denied the plaintiffs' allegations of refusal of fair representation in the processing of their grievances.

## II. UNDISPUTED FACTS

The following facts have been admitted by the parties:

A. The Court has jurisdiction of this action and the parties.

B. At all times pertinent to the allegations of the consolidated complaints, defendants Westinghouse and the Unions have been parties to a collective bargaining agreement. This agreement covers all production and maintenance employees at Westinghouse's Little Rock, Arkansas plant. Plaintiffs occupied production jobs at the Little Rock plant, and their wages, hours, and working conditions were governed by the terms of the applicable labor agreements then in effect.

C. Plaintiff Christine Vaughn applied for and was hired by Westinghouse on or about July 13, 1970, as a sealex machine operator, Labor Grade 4, at the wage rate of \$2.20 per hour. On or about November 16, 1970, she was transferred to Supervisor Oscar Brazil's section as a sealex machine operator and was then earning \$2.54 per hour. On January 25, 1971, she was changed from second to third shift due to a reduction in force and continued working as a sealex operator receiving a general wage increase which raised her rate of pay to \$2.69 per hour.

On or about April 19, 1971, she was disqualified as a sealex operator and placed on the open Labor Grade 1 job of bulb loader (hand) earning \$2.45 per hour. On November 6, 1972, employee Vaughn transferred at her request from second to third shift and was then making \$2.76 per hour as a bulb-loader. On January 29, 1973, she transferred again at her request to the job of packaging operator-sleeving, a labor grade 3 job, with the same rate of \$2.76 per hour. On March 28, 1977, she changed from packaging operator sleeving to utility operator -SIG- with a rate of pay of \$4.46 per hour.

On April 19, 1977, she became disabled and returned to work on June 13, 1977, as a utility operator earning \$4.71 per hour. On January 1, 1979, she was transferred as a result of a reduction in force back to the job of packaging operator sleeving at the rate of \$5.40 per hour. She has continued in this job until the present time.

\*\*\*

### III. UNCONTESTED ALLEGED FACTS

It is alleged in the Complaint of Gee and Vaughn that they were discriminated against on account of their sex, and while these plaintiffs are unable to concede any facts relating to these allegations, they do not intend to contest defendant's denial of any sex discrimination as to them at trial.

There are no other alleged facts which any party is unable to concede but does not intend to contest at the trial by evidence to the contrary.

### IV. OBJECTIONS TO ADMISSABILITY

There are no objections, qualifications or reservations by either party to the admissibility of any facts or matter covered by this stipulation.



V.  
ISSUES OF FACT AND LAW

A. The mixed issues of fact and law to be resolved are as follows:

1. Plaintiff Christine Vaughn:

(a) Was employee Vaughn disqualified, reduced in labor grade ("bumped"), declared surplus from any of her jobs or denied promotional opportunities on account of her race?

(b) Was employee Vaughn issued a written warning for being repeatedly late to work on account of her race?

(c) Was employee Vaughn verbally abused or otherwise harassed on the job by any of her supervisors on account of her race?

(d) Was employee Vaughn denied fair representation by the Unions by their failure to file a grievance with the Company on her behalf?

\* \* \*

VI.  
RELIEF SOUGHT

Plaintiffs seek an injunction enjoining defendant Company and the Unions from violating the provisions of the Civil Rights Act of 1866 and 1964. Plaintiff Glenda Crutcher seeks reinstatement and back pay from the time of her alleged discriminatory discharge. In addition, plaintiffs Gee and Vaughn seek from the Company and/or the Unions job transfers, promotions or job reclassifications and back and front pay to remedy their allegations of job or fair representation discrimination. Counsel for plaintiffs also seek a reasonable attorneys' fee.



Defendant Westinghouse and the Unions ask that the remaining individual allegations of discrimination in the Consolidated Complaints be dismissed with prejudice in their entirety and for a reasonable attorneys fee.

## VII. SCHEDULE OF EXHIBITS

A. Plaintiffs' Exhibits (To be provided by Plaintiffs)

B. Unions' Exhibits:

1. All Exhibits attached to the Unions' motion for summary judgment.

2. Exhibits pertaining to grievances and arbitration awards of other black and female persons employed in the bargaining unit.

C. Westinghouse's Exhibits:

1. 1970-1973 Labor Agreement.

2. 1973-1976 Labor Agreement.

3. 1976-1979 Labor Agreement.

\* \* \*

Christine Vaughn.

33. a-v. Employee Payroll Authorization Changes from hire through present.

34. Employee Evaluation and Change in Status of January 25, 1971, as a result of reduction in force.

35. Notes to Personnel File of March 23-24, 1971, of Supervisor C. T. Turnage regarding oral reprimands.

36. Notes to Personnel File of March 30, 1971 of Supervisor Turnage regarding oral reprimand.

37. Notes to Personnel File of April 15, 1971, of Supervisor Turnage regarding oral reprimand.

38. Notes to Personnel File of April 19, 1971 of Supervisor Turnage notifying Vaughn of her disqualification as sealex operator.

39. Change in Employee Status and Evaluation of April 19, 1971.

40. Displacement Notice of April 25, 1974, of Employee Vaughn as 3rd Shift Packaging Operator-Sleeving by more senior employee Jacquelyn Randall due to reduction in force.

41. Displacement Notice on April 25, 1974, of Employee Snyder as 2nd Shift Packaging Operator-Sleeving by more senior employee Vaughn due to reduction in force.

42. Request for Transfer, Bid Post Notice, and Acceptance Notice of 3rd Shift Utility Operator-SIG Job by Employee Vaughn on February 24, 1977.

43. Bump Sheet Notice of December 12, 1978, when Employee Vaughn was declared surplus in Department and bumped less senior employee Beavers as Packaging Operator-Sleeving on 3rd shift.

44. a.-b. Discipline Report of September 26, 1972 of Supervisor O. D. Brazil for tardiness and Absentee Record, 1972.

45. a.-b. Discipline Report of May 30, 1975 of Supervisor Ray Crowder for tardiness and Absentee Record, 1975.

46. a-b. Discipline Report of April 13, 1976 by Supervisor R. W. Skelly for absenteeism and tardiness and Absentee Record 1976.

47. a-b. Discipline Reports of October 13, 1977 and June 22, 1978 by Supervisor Skelly for absenteeism and tardiness and Absentee Record, 1977.

(Exhibit Numbers Changed at Trial)

• • •

Dated this *13th* day of April, 1979.

(Signature of counsel omitted)

TESTIMONY

\* \* \*

[T. 4] CHRISTINE VAUGHN, called as a witness, by and on behalf of the Plaintiffs, having been first sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CRUTCHER:

Q. State your name, please.

A. My name is Christine Vaughn.

Q. And your address, Mrs. Vaughn?

A. 1804 Jones.

Q. Mrs. Vaughn, where are you employed?

A. I'm employed at Westinghouse.

Q. Do you recall the original date of your employment?

A. July 13, 1970.

Q. Okay. Do you recall the first job that you received once you became an employee?

A. Sealex operator.

Q. Do you recall the grade of this job?

A. At that time, it was a grade four if I'm not mistaken.

Q. Okay. Mrs. Vaughn, how did you receive the job? Did you bid on the job or were you placed on the job?

A. I was placed on the job.

[T. 5] Q. Once you received the job as sealex operator, was there any training period that you underwent?

A. A temporary training period.

Q. Would you mind explaining?

A. Well, what I mean by that is when I got hired in, it was the week before vacation. And, within that one week of working prior to going on vacation, I was trained partially, during that one week.

Q. Okay. Now, who assisted or who attempted to train you?

A. At the time, it was Lois Black, the girl that I was replacing.

Q. Was she a fellow employee?

A. Yes.

Q. Was she white or black?

A. She was black.

Q. Okay. Did anyone else give you any training on that job?

A. After I requested it.

Q. Okay. You stated that you were on the job for approximately one week, and you were being trained by Lois Black, and then the plant went on a two-week vacation?

A. Right.

Q. When you came back off vacation, did you remain on the sealex job?

[T. 6] A. Yes.

Q. And at that point in time, were you given any training?

A. Not any — not when I first came back.

Q. Do you recall the name of your manager or supervisor?

A. Roger Maynard.

Q. Did you request any training from Mr. Maynard?

A. I did after he complained that I wasn't doing as he thought I should be on the job.

Q. How long after you were employed did Mr. Maynard bring to your attention that you were not making grade or production on this particular job?

A. About a month.

THE COURT: Mr. Crutcher, excuse me, but, do you know how to spell Maynard?

MR. CRUTCHER: M-a-y-n-a-r-d.

MR. MOORE: That is correct.

THE COURT: Thank you.

Q. (BY MR. CRUTCHER) So you were on the job for approximately one month and Mr. Maynard brought it to your attention that you were not making production?

A. Right.

Q. Did you then have any conversation with him in regards to the reason why you may not have been making production or what production was?

[T. 7] A. Yes.

Q. Do you recall the essence of your conversation?

A. Well, he—they have a system, or however you want to put it, the foreman who's over you, whatever your job is, he will tell you how you're doing. They keep a record of however, and he came to me and told me I was not making production and I asked him as to what I was supposed to do and however. And in the process of him—I told him the reason why that I didn't feel that I could make production at the time was because that I hadn't had a reasonable enough amount of training.

Q. Did he then provide you with any training?

A. Not right at the moment. You, not right off. It was about two weeks before he finally placed someone working with me and that wasn't for very long.

Q. And so you continued to work on the sealex operator job after Mr. Maynard brought you this attention about training?

A. Right.

Q. Were you able to make production during this period of time?

A. Yes.



Q. Okay. Did you to — or did you have any subsequent conversations with Mr. Maynard in regards to any more training or supervision?

A. Do you mean if I asked for any more supervision?

[T. 8] Q. Or training, yes, Ma'am.

A. Or training — no, after I made production, he said I was qualified then.

Q. Okay. Did you continue to work on the sealex job?

A. Yes.

Q. Have you gone or moved to any other job?

A. Yes. I am now friden operator.

Q. Okay. Now, how did you get that job?

A. Well, I was on sealex and I got bumped. Then, which I still remained on sealex, but on a different shift. Then, at the time my foreman was Clint Turnage, and he came to me and told me that I had been disqualified, which he had received a notice from the front office. And to my knowledge, to this day, I don't really understand why I was disqualified. But I do know, as far as my records are concerned now, I am still a qualified sealex operator.

Q. Okay. Now, you were informed by one of your supervisors, Mr. Turnage, that you had been disqualified by the front office for the sealex operator job?

A. Right.

Q. What grade was that job?

A. That was a four.

Q. Okay. And you were then displaced?

A. Right.

Q. What position or job number did you go to from there?

[T. 9] A. Number one, which was bulb loader.

Q. Okay. Did that job, a number one, pay less than a number four?

A. Yes.

Q. Okay. Now, after you were informed that you had been disqualified on the sealex, were you making production prior to your disqualification to your knowledge?

A. Yes.

Q. And you stated that sometime thereafter, that you found out that you are still qualified on the sealex job?

A. Right.

Q. How did this information come to your attention?

A. I was bumped, and when you are bumped they show you a form as to which jobs you can take or what you've already had, you know, if you've been on something else. Or what's open to you. And in the process of being bumped, this is how I found out I was still a qualified sealex operator.

Q. Okay. Have you attempted to exercise your qualification on the sealex operator since finding out that you are still qualified?

A. No.

Q. Okay. Have you requested any explanation from any of the management employees there at Westinghouse as to you still being qualified on the sealex job as opposed to receiving knowledge that you had been disqualified?

[T. 10] A. No. I just left it alone, cause at the time that I found — first found out I hadn't been there any length of time to really upgrade myself to any point as far as jobs was concerned.

Q. Mrs. Vaughn, do you recall when you may have gotten with your original Counsel, Mr. Kaplan, and drafted up a Equal Employment Opportunity charge of discrimination?

A. To my knowledge, if I'm not mistaken, it was over five years ago, almost.

Q. About five years ago. Okay. Do you recall the essence of your charge that you drafted?

A. When I went to Mr. Kaplan, it was because I felt like at the time, Westinghouse was being very discriminatory. I was having — I had had problems out of the foreman on certain jobs, jobs that I had had.

Q. What was that foreman's name?

A. At the time the foreman I had the problems out of was O.D. Brazil.

Q. Was he white or black?

A. He was white.

Q. O.D. Brazil?

A. Brazil. B-r-a-z-i-l.

Q. You'd had some problems out of him?

A. Yes.

Q. What was the nature of these problems?

[T. 11] A. Well, I was a bulb loader and the job I had, which was not very hard, he was constantly harassing me, which I felt was no reason at all.

MR. MOORE: Excuse me. Objection, Your Honor, harassing is a conclusion. We object to the witness' conclusions.

THE COURT: Overruled.

A. (BY MRS. VAUGHN) Well, he was giving me problems, I'll say then, and the pressure that he was putting on me, I didn't feel like was necessary. So I then went to Tom Hunnicutt, who was our—at the time was our personnel manager, who at the beginning, when you are first hired in, tells you that if you have any problems or anything, you come to him. And, in the process of going to Mr. Hunnicutt, I not only went once, I went several times—

Q. What did you complain about when you went to Mr. Hunnicutt?

A. I told him that I felt that Brazil was pressuring me.

Q. Did you tell him why you thought that?

A. Yes. Because he was constantly on more blacks, to my knowledge, than he was whites. It was some whites that he gave problems, but basically, blacks. And the job, the way I felt about it, didn't need any type of problems from him because there were the other girls to tell me something to do pertaining to my job.

[T. 12] Q. Okay. Were you able to get any satisfaction from Mr. Hunnicutt?

A. No, I was not.

Q. What did Mr. Hunnicutt do, if anything?

A. He said he would talk to them, but if he talked to them, I don't know. But, it continued to go on to the point I wrote to the EOA.

Q. And what did you communicate to the EOA?

A. I told them that I was having problems out of this foreman, that I had tried to communicate with the plant personnel and they didn't seem to take into hand and I'd gone to the—I didn't go directly to the Union, but I talked to the shop steward. We have a shop steward that are supposed to meet back and forth between you and the union. And I asked in reference for them to draw up a grievance, which they did not do. And, I then went back to Mr. Hunnicutt, and in the process of talking to Mr. Hunnicutt, I told him that I still feel like that Mr. Brazil was prejudiced. And then in due process, Mr. Hunnicutt told me that he didn't feel like Mr. Brazil was prejudiced because he had known him for so many years. And I told him, well, in those years that he wasn't black and I was. And then, to that extent, this is what made me go further.

Q. Okay. After you went to Mr. Hunnicutt and complained to him about Mr. Brazil, did Mr. Hunnicutt, to your knowledge, personally observe you working under Mr. Brazil?

[T. 13] A. Oh, yes. I was well observed.

Q. After you went and complained to Mr. Hunnicutt, did he come back to see what may have been the problems that you were trying to relate to him about?

A. No, the observance did not start until after I had filed — went to the EOA and what have you to that extent to get any type of — any kind of reaction from them. That is when the observation started, to my knowledge.

Q. Okay. Did you continue to work under Mr. Brazil?

A. I did.

Q. Okay. Since you went to Mr. Hunnicutt and filed your charge with EEOC, have you had any other foremans?

A. To really give me — no.

Q. Okay.

A. He was the main one.

Q. Okay. After you filed your charge of discrimination and your suit in 1974, what was the conduct, if any, of Westinghouse towards you?

A. Of the employees, the foremans, or what?

Q. Your fellow employees, your foremans, or Mr. Hunnicutt, Personnel Relations Manager?

A. As a whole, I didn't have any more problems out of anybody, not, you know, but I was — I am constantly being observed occasionally I mean, I'm not saying they observing me, but occasionally I, you know, I notice different ones [T. 14] watching me.

Q. Okay. Mrs. Vaughn, have you been able to exercise your seniority in holding the jobs that you wish to hold?

A. Yes.

Q. Have you been informed or have you been given the opportunity by the management of Westinghouse to bid

back on a sealex operator job, the job that you were originally disqualified?

A. Well, according to my papers, or what have you, I am qualified. I never taken it on my own to bid on the job.

Q. Okay. But this knowledge that came to you came sometime after you were notified that you were disqualified?

A. Right.

Q. And the sealex operators job is a job four?

A. Yes.

Q. And the bulb washer that you went to was a job one?

A. Yes.

Q. Is there a difference in pay between a four and one?

A. We have number one, number two, number three and number four and sealex is number four. It's a vast difference in pay.

Q. How long did you work as a bulb washer after you were disqualified?

A. I stayed on it about a year and half until I decided to bid on something else.

[T. 15] Q. And so you received a difference in pay between a job four and a job one for approximately a year and a half?

A. Yes, that's right.



Q. And during that year and a half, did it come to your attention that you were actually still qualified on the sealex job?

A. No.

Q. Okay. Do you recall, when you were disqualified on the sealex job the percentage or the number of blacks or whites who were working on the job at the time on your shift?

A. On the sealex?

Q. Yes, Ma'am.

A. I can't—they possibly—it was more whites than blacks. We had very few black sealex operators then.

Q. Okay. Do you know the name of the individual and the race of the person who received your job once you were disqualified?

A. She was white and I don't know her married name—she's married now—but she—her first name was Patty something, I think.

Q. But she was white?

A. Yes.

MR. CRUTCHER: Pass the witness at this time.

THE COURT: Let me ask you a couple of questions, Mrs. Vaughn. Tell me what a sealex operator does.

[T. 16] THE WITNESS: A sealex operator, mainly she runs the machine; she's basically responsible for the production, in other words, how many bulbs goes out. It's

hard to explain, but anyway, there's the light bulb which we all receive there, it's considered a blow when you first get it, just a tube, and it's a machine which runs mounts along to you, which another girl is responsible for sending bulbs to you. You have the bulbs in one hand, the mounts in another and you put the bulbs, you wrap them on a turn table like, and you put the mounts in the heads in which goes around this globe sits down over the mount, the machine fills it, sends it down. You have a operator which is, basically who catches it, puts the base on there, which you screw into the socket. She then sends it down and you have another operator which — which we'll call inspector packer number five. She checks it, packs it out, sends it downstairs.

THE COURT: And what does the bulb loader do? Where —

THE WITNESS: The bulb loader — well, they don't have too many bulb loaders out there now, but we basically just load lamps on the machine racks. We just stand there and load them, what have you.

THE COURT: And is that before the sealex or after?

THE WITNESS: After the sealex.

THE COURT: When you were bumped and went down to [T. 17] level one, did you observe how many blacks and whites were working on level one?

THE WITNESS: Basically all the bulb loaders by hand were black.

MR. CRUTCHER: Mrs. Vaughn, I want to ask you a question.

Q. (BY MR. CRUTCHER) Are they any other way to — are there any other jobs there at Westinghouse, to your knowledge, other than manual bulb loaders?

A. Now, the majority of them are run by machine.

Q. Okay. But at that time they were by hand?

A. By hand.

Q. Okay. And the majority of those workers were black or white?

A. Black.

Q. And on the job that you were bumped off of, the sealex job, the majority of those workers were black or white?

A. White.

Q. All right. Do you know of any other instances of racial discrimination treatment involving other blacks?

A. Oh, there were constantly being, you know, different ones saying that they were being discriminated against.

Q. Did you actually observe any other instances of discrimination or discriminatory treatment in regards to other blacks while there at Westinghouse?

[T. 18] A. Yes.

Q. Would you mind telling me about those instances that you observed?

A. You mean elaborate on them?

Q. Sure.

A. Now I can't give you the names, cause I'm not good at remembering names.

Q. Just do this, give me whether they were black, white, male or female and the particular job they were working on, to the best of your knowledge and recollection.

A. Well, you had people like, I should say — well, we have the seniority thing where they bump and what have you. This is nothing — we can't control this, but you have foreman who I feel they make it a little harder on some blacks than —

MR. MOORE: Objection. Your Honor, I object to this testimony. Her feelings would not be relevant. Only specific instances of occurrences that were discriminatory would be admissible, but not her feelings.

THE COURT: The objection is well taken. Mrs. Vaughn, tell us why you have that feeling.

THE WITNESS: Well, I'll put it like this. You have some blacks that sometimes were constantly on to and they are some whites doing the same thing they're never saying anything to, or giving them any type of recommendation or anything of this nature. This is what I mean. And when you are [T. 19] constantly on one person and we're all doing the same thing, and they doing just as much as you, and you're not being — it's nothing being said to them, well, then I feel like, well, that's the thing in that they're being different toward one to the other.

Q. (BY MR. CRUTCHER) Are you saying because of your personal observation, you have that feeling?

A. Yes.

Q. Okay. Could you give me any more instances and the names of particular foremans and their race that you may have observed who have possibly discriminated in terms of their treatment towards blacks as opposed to white employees who were under his or her supervision?

A. Well, I, Brazil. Now, he's white and a good example. Not only me, but there were other blacks. There was a Frances Jackson, she once was a mount operator in his department, and he was constantly on her. And there were other white operators on the same job doing the same thing, but he never once reprimanded them no kind of way. And there were some whites that bided out of his department just to keep from going through those type of changes and everything.

Q. Okay. To your knowledge, do you know whether or not Mr. Hunnicutt or any of the management there at Westinghouse may have come out and observed the treatment that you are speaking about these blacks were undergoing under their [T. 20] supervisors?

A. Not to my knowledge.

Q. Do you know whether or not you or any other blacks may have gone to personnel relations, Mr. Hunnicutt, or anyone in that department to complain about this type of treatment?

A. There were—have been people, you know, that say that they have gone to him to complain. Now, as to him observing them or what that he did in their case, I do not know. This is something different.

THE COURT: Mrs. Vaughn, were the foremen white?

THE WITNESS: Yes.

THE COURT: All of them?

THE WITNESS: All foremans are white. We only now have two black foremen, to my knowledge.

THE COURT: Out of how many?

THE WITNESS: We have three shifts, and we have two black foremen, one on second, and one on days.

Q. (BY MR. CRUTCHER) How many foremans do you have per shift, to your knowledge?

A. I don't know, I'd have to count them up.

Q. On your shift — on your shift, are you able to recall how many foremans on your shift?

A. I think it's four. Three or four.

Q. Three or four. And have you worked different shifts since you have been employed at Westinghouse?

[T. 21] A. Yes.

Q. And would it be safe to say that you have that same number or number in —

A. It would be more because on the third shift it's less work going on. See I work 11:00 to 7:00 and there are more departments going on the other two shifts than there are on third shift.

Q. So it would safe to say there would probably be more foremans on the 7:00 to 3:00 and 3:00 to 11:00 shift as opposed to the shift you're working?

A. Right.

Q. Okay. Now, during your employment at Westinghouse, have you worked on the various other shifts?

A. Yes.

Q. Okay. When you worked on those shifts, were you able to observe any of your foremans and their treatment of blacks and other employees?

A. Not—I can't really say that I observed it. I'm just saying I only heard it, you know, what people say; as far as me observing, no.

MR. CRUTCHER: Pass the witness.

THE COURT: Mrs. Vaughn, when was the first black foreman hired, do you know?

THE WITNESS: To my knowledge, he was there when I got there. He was a—fork lift driver.

[T. 22] THE COURT: But, when did he become a foreman, that's what I meant to say?

THE WITNESS: I don't actually really know how long it was. It was during the time that this suit was filed. He was still a fork lift driver, within that time somewhere he became foreman.

THE COURT: All right. Mr. Moore, you may cross examine.

MR. MOORE: Thank you.

#### CROSS EXAMINATION

BY MR. MOORE:

Q. Mrs. Vaughn, now if I understand you correctly, you were originally hired in as a sealex machine operator in 1970?

A. Right.

Q. And you were bumped off of that job by another employee?



A. Yes.

Q. And the other employee that bumped you had more seniority than you, is that not right?

A. Right.

Q. And it's not your contention that your being bumped from the sealex machine operator's job on that occasion was on account of your race?

A. No.

Q. You went to the bulb loader job, I believe, in, you [T. 23] testified, for what period of time?

A. I didn't — when I got bumped, see, I got bumped first, and I only changed shifts, which I still remained on the sealex.

Q. Still remained on the sealex?

A. On the sealex. I changed shifts. Then, after changing shifts and working under Clint Turnage, they disqualified me.

Q. All right. Mr. Turnage disqualified you; is that correct?

A. He said — well, it was said — he — the way he put it to me is that the front office gave him a notice to disqualify me.

Q. After you were told by Mr. Turnage that there were some records from the front office that, in your testimony, he based his decision to disqualify you on, you did not dispute that at that time did you?

A. No.

Q. You accepted that and filed no grievance with the Union over your disqualification, did you?

A. No.

Q. You are aware that employees in production jobs at the plant are required to make certain levels of production on their shift?

A. Right.

[T. 24] Q. And that if an employee does not make that level of production, or has too much waste, wasted product, the employee can be disqualified on the job?

A. Well, at the time the only knowledge that I had was that you had to make a certain amount of production, but as far as to the waste, that was not explained to me then.

Q. It was not explained to you originally, that if you had too much wasted product during your shift that this could result in disqualification?

A. No.

Q. Did not Mr. Turnage, when he was your supervisor, when you were the sealex machine operator on his shift, not sit down with you — not sit down with you, but go over with you your problems as a sealex machine operator, while he was your supervisor, before he disqualified you?

A. No.

Q. Did he not talk to you about burning a whole lot of wires?

A. Mr. Turnage did not discuss anything as to my job. The only person that discussed sealex to me was Roger Maynard. I was under him before I went to Turange.

Q. It's your testimony then, that Mr. Turnage at no time before he disqualified you as a sealex machine operator, ever notified you that you were not doing a good job?

A. No, Mr. Turnage did not.

[T. 25] Q. He never did?

A. No.

Q. Did Mr. Turnage give you any assistance to help you become a better sealex machine operator while he was your supervisor before you were disqualified?

A. Yes, because I asked because I was on a new different machine that they had just introduced to the plant.

Q. All right. You say you were on a new machine. What was the difference in this machine —

A. This was a —

Q. —than the machine you originally trained on?

A. The difference in this machine — it's not that much difference, but it's a difference. All those machines run different. They run the same, but they run different in that — well, you would have to see them to understand what I'm saying. But the difference in that machine and the machine I was trained on is that it was a different setup as to how to make the bulbs.

Q. A different setup?

A. Well, it basically ran the same as far as to make and what have you, but you had a little more to deal with as far as certain ways the mount the machine operates like that, in order for them to go into the bulb.

Q. All right. Mrs. Vaughn, while you were supervised by Mr. Brazil, what job were you performing?

[T. 26] A. Bulb loader.

Q. Bulb loader. Was this before you became a sealex machine operator the second time?

A. After.

Q. Pardon?

A. After I was disqualified.

Q. After. Did Mr. Brazil ever issue a written warning for being late to work too many times?

A. No. It came up, I was off. This is how the warning came into effect, the written warning. I was—we'd had some words the night before and the day after my little girl took sick and I took off and took her to the hospital, and as far as he was concerned, it was not good enough explanation and he then in return gave me a written warning in front of the shop steward.

Q. Do you remember when that was?

A. No, I don't recall exactly when.

Q. Is that the only occasion that you had missed work before Mr. Brazil gave you the written warning?

A. No, I'd been off before.

Q. Who were you riding to work with at that time, when you got the written warning?

A. A girl named Betty — something. I don't remember her last name.

Q. But, did this cause you any problems in getting to [T. 27] work?

A. Yes, it did. It caused me to be late many times and they had not given me ample warning.

Q. Now, obtaining transportation to go to work is the employee's responsibility?

A. Right.

Q. And after you had been late a number of times, Mr. Brazil did issue you a written warning?

A. No. He came to me orally and I told him why I was having problems with which I tried to covert.

Q. But, did not he subsequently on October 13, 1977, issue you — or some point — a written warning?

A. Yes, he did give me a written warning.

Q. He did give you a written warning. I'll correct myself, the date of that was September 26, 1972, does that seem about right?

A. I don't remember. I do know that he gave me one.

Q. All right. Do you remember when you bid on and successfully received the sleeving operators job?

A. I think it was the latter — I bid on it. The latter part of '74, but I don't think I got it at that time.

Q. Latter part of '74 or early '75?

A. Yes, right.

Q. And, thereafter, you were aware that jobs — let me ask you this — what classification is sleeving operator?

[T. 28] A. Three.

Q. Three? Sealex was four?

A. Yes.

Q. And after you became a sleeving operator in 1974 or early '75, you were aware through the job posting procedure, that jobs in higher classifications, four jobs, became available for bidding?

A. Yes.

Q. But, you did not, you did not choose to bid on them, did you?

A. When I bidded on sleeving, that was a higher job, than what I was on.

Q. All right. But you did not bid again on a number four job after you got the sleeving job?

A. No.

Q. You have a seniority date, I believe of July 13, 1970?

A. Right.

Q. So, if a sealex job grade four or some other job grade of a higher grade than sleeving operator became available and you had bid on it after you became a sleeving

operator and had greater seniority, no reason in your mind to think that you would not have gotten that job?

A. I have bidden on a four, a utility operator, which was a four.

[T. 29] Q. Did you get that?

A. Yes.

Q. All right. Mrs. Vaughn, you mentioned that you felt that Mr. Brazil got on to you and whereas, he didn't get on to other white employees. Now, is it not correct that Mr. Brazil criticized not just you and other black employees, but he also criticized or reprimanded the performance of white employees around you, too?

A. Well, to my knowledge, he did not. And what I meant by that is, that at times when he would get on me, just take for instance, your group goes down, you're working for—on an assembly line and in return, I'll do what is—what is required of me as to my working area. In the process if my group has not started back up, I may go and help someone else in their working area. He will come to me and tell me to, say sweep the floor, or something of this nature, and there's my working colleagues, who are white, they are standing around just like I am, and he does not tell them to do the same.

Q. Well, is it not correct that on occasion you might be talking to another black operator during working time and Mr. Brazil would criticize you for this, but not say anything to the other black employee?

A. That's true, too.

Q. So, he was not just criticizing you for talking when you were only talking to a white employee; right?



[T. 30] A. Basically I would be talking to blacks.

Q. All right. And he would say something to you, but not say something to the other black that you were talking to?

A. Right.

Q. Now, were not you aware that there were some white employees that worked near you on your shift who complained that they thought that Mr. Brazil had unjustifiably reprimanded them, too?

A. I heard, but I didn't observe it.

Q. But you had heard this?

A. Yes.

Q. You did not file any grievance over Mr. Brazil's issuance to you of a written warning for absenteeism and lateness, did you?

A. No, because at the time he gave it to me I felt like it was due process then.

Q. I'm sorry?

A. I felt like at the time he gave me the written warning that I deserved it.

Q. Is it not correct, Mrs. Vaughn, that your only contention with respect to discriminatory treatment by Westinghouse on account as race is concerned, pertains to the treatment by Mr. Brazil and nothing else?

A. No, no.

Q. Do you recall when I took your deposition back in [T. 31] my office on March 12, 1976?

A. Yes, I remember the deposition.

Q. I asked you these questions at Page, beginning at the bottom of Page 31 of your deposition:

Question: Other than the things that you have stated with regard to Supervisor Brazil, do you feel like Westinghouse has discriminated against you in your employment in any way?

Answer: What do you mean?

Question: Well, you stated that you felt like Mr. Brazil was prejudiced against you, and I'm saying besides that which you already testified to, do you feel like Westinghouse as in any other way discriminated against you in your employment on account of your race or your sex?

Answer: To me:

Question: Yes, Ma'am.

Answer: Just me myself?

Question: Yes, Ma'am.

Answer: No. Do you mean as far as any job that I've taken or — I'm trying to understand your question.

Question: Yes, that's what I mean.

Answer: To me and some of my jobs, and what have you, no, not really.

Was that not your testimony to me when I took your deposition?

[T. 32] A. Yes, at the deposition, yes. But to this question you just asked me, you said, "Was Westinghouse discriminatory to others?" This is the way I'm understanding this question.

Q. All right.

A. Now, as to the deposition, I recall you asked to me, at the time, any more than what has gone on, no.

Q. So, only as to you, you feel like Westinghouse—against you by Mr. Brazil's treatment?

A. Yes, and that is—to that question, yes.

MR. MOORE: Thank you.

THE COURT: Maybe I misunderstood the testimony, but it was Mr. Turnage who told you you were disqualified?

THE WITNESS: Yes.

THE COURT: Is it your contention that he did that because of race?

THE WITNESS: No, Mr. Turnage told me that I was disqualified as to a notice from the front office. I do not feel that Mr. Turnage himself disqualified me. He said that he was given a notice by the front office to disqualify me.

THE COURT: Well, do you feel like someone in the front office or anyone else at Westinghouse disqualified you because of race?

THE WITNESS: Well, I'll answer you like this. The young lady that took my job was trying to get a higher paying job which she was white, and there have been incidents where [T. 33] you can be disqualified, bumped, or however, where another person can resume their job. So, I'll just

leave it that it's possible, because Mr. Turnage himself did not talk to me as to my job qualifications that I wasn't working up to par, and however. This is why I feel like it was something toward more than just being disqualified, but at the time when I was disqualified I did not go into it, because, like I say, I had not been there any length of time to raise being or however you want to put it.

THE COURT: So your main complaint, at least, relates to Mr. Brazil?

THE WITNESS: Yes.

THE COURT: All right. Any redirect, Mr. Crutcher?

MR. CRUTCHER: No, Your Honor.

THE COURT: You may resume your seat.

MR. CRUTCHER: Yes. Yes, Your Honor, if I may.

THE COURT: Go ahead.

#### REDIRECT EXAMINATION

BY MR. CRUTCHER:

Q. Mrs. Vaughn, when you were originally hired and you stated earlier that you were placed on the sealex operators job?

A. Yes.

Q. Okay. Were you told by your foreman or anyone [T. 34] there in industrial relations at Westinghouse what was the job standard required or expected of you?

A. No, I wasn't.

Q. Have you since been told?

A. Not really.

Q. Well, what do you mean, not really?

A. What I mean by this, is they did not sit down and explain, word for word, that you are required to run so many thousand bulbs and so many hundred bulbs, this was not explained. The girl that trained me, she just showed me, more or less, how she ran the bulbs, and that was that.

Q. Okay. Now you stated to Mr. Moore, the question that he was asking you concerning statements that you made earlier in your deposition.

A. Yes.

Q. Now, this was in March, 1976, is that correct?

A. Yes.

Q. Now, when did you find out through your investigation there at Westinghouse, that you were still qualified for the sealex job?

A. Well, after going to sleeve, I was bumped. In return, I was bumped from — I was — I remained on the same job, but I went from one shift to another. I was able to retain the same job, but I was just bumped by one with more seniority off of that shift, and in the process of being bumped, this [T. 35] was when I found out that I was still a qualified sealex operator.

Q. Okay. When was that?

A. I was bumped off of sleeving in — I took the job of sleeving in '74 or '75. So it musta been about '76.

Q. About '76. When you later found out you were still qualified?

A. Right. And I was not too long ago bumped, which was back in January or February, and I still am listed as qualified as sealex operator.

Q. Okay. Mrs. Vaughn, when Mr. Turnage apprised you of the fact that you were being disqualified as a sealex operator, did he show you any information showing you that you were disqualified?

A. No, he didn't. He told me that I had been disqualified to—from—due to a note from the front office.

Q. Did he tell you why you were disqualified?

A. No, really, he just said that the front office had told him to disqualify me.

Q. Had Mr. Turnage told you what production was, or expected?

A. No.

Q. Had he given you anything in writing that indicated what production may have been?

A. No.

[T. 36] MR. CRUTCHER: I have no further questions of this witness.

THE COURT: Any recross, Mr. Moore?

MR. MOORE: Yes, Your Honor.

## RE CROSS EXAMINATION

BY MR. MOORE:

Q. Mrs. Vaughn, you said that you were positive that another employee, a white employee, replaced you in that job?

A. Yes.

Q. And you said you thought her name was Patty—

A. Patty—something. I don't know her last name. She's no longer out there.

Q. Did you—when you went from the bulb—you went from sealex operator—

A. After I was sealex I was the bulb loader.

Q. To a different place in the plant?

A. Yes.

Q. And you would not have been working in that same area?

A. The place where I went—where I came from, which was the sealex department, is behind the section which I was working as a bulb loader.

Q. Are you saying that you personally observed another lady doing your job after you were disqualified?

[T. 37]A. Yes, right.

Q. And her first name was Patty, but you don't remember her last name?



A. No, I don't. She's married now.

Q. Could this have been on a different group?

A. No, the same group.

Q. Do you know what her seniority date was?

A. No, I don't.

MR. MOORE: I have nothing further.

THE COURT: Any further redirect, Mr. Crutcher?

MR. CRUTCHER: No, your Honor.

\* \* \*

[T. 116]

(Testimony of Wilma Donley)

\* \* \*

Q. Okay. Did you remain a final inspector up until the point in time which you were terminated or your employment relationship with Westinghouse ceased?

A. Yes, I was the same.

Q. Okay. Mrs. Donley, during the period of time you were employed there at Westinghouse, were you affiliated with the Union?

A. Yes.

Q. Okay. What position, if any, did you occupy with the Union?

A. I was shop steward then.

Q. Okay. Do you recall when you were a shop steward?

A. I would say mid-February of '73. I'm not too sure about the date.

Q. Okay. Let's say '73; and how long did you occupy that position?

A. Okay. Maybe to December, '74. I'm still not sure about that date.

Q. Okay. During the period of time that you were a union steward there at Westinghouse, did you process any grievance filed on behalf of black union members against their co-workers or their supervisors in your capacity as union shop stewardess?

A. Yes.

Q. Do you recall any of the specifics of any of those [T. 117] grievances?

A. Yes, one in particular. A Mr. Leon Harris.

Q. Is he black or white?

A. He is black.

Q. Okay. What was his grievance?

A. Well, he was--he was being harassed by Mr. Jim Birch.

Q. Did you witness this harassment?

A. I witnessed that.

Q. And how did you--

MR. MOORE: Objection to the term harassment.

THE COURT: Overruled.

Q. (BY MR. CRUTCHER) How did you, how were you able to witness the conduct of Mr. Harris and his supervisor?

A. Well, Mr. Harris was working on a bulb loader, on the same machine, the same group that I was on which was group four, and by observing him--okay--my job as shop steward, at that time, gave me the right to really observe my environment, what was going on around me, and I noticed that he hadn't had too much training on the job, because the machine stayed down quite often; and Mr. Jim Birch, during this particular time I think most of the machines were down, and he was just really in a fidgety mood, and he got onto Leon about getting the machine fixed--well, there's glass on the floor; he got onto him about there being glass on the floor, because the [T. 118] machine was messing up, the glass was breaking. Then he wanted him to fix the machine--to get the machine going and he had told him about something else. What I could really visual was his--okay--was his mad, the madness coming out of him because the man was really asking him to do too many things at one time. And I heard him tell him--

Q. Who, you heard who?

A. I heard Mr. Birch tell him to get the damn glass off the floor and maybe you can see what you are doing. Now, this was after he had told him to fix the machine, and he came over to my machine and asked me what could he do, did he want to file a grievance. And I told him right there I seen everything that's going on. I said, "You just go on over and finish," you know, and try to do. Well, he said, "Well, I can't do all of this and I'm not going to try to do it." He said he could do three--all of these things he's telling me to do at one time, you know.

Q. So, did Mr. Harris actually file a grievance with you?

A. Yes, he did.

Q. Okay. In his grievance, did he, did he name any particular supervisor?

A. Yes.

Q. Okay. Who was that supervisor?

A. Mr. Jim Birch.

[T. 119] Q. And he's--is he white or black?

A. He's white.

Q. Okay. What was the disposition of Mr. Harris' grievance?

A. That Jim Birch was giving him more than one job to do, too much to do at one time; and that Mr. Heath told him that Mr. Jim Birch seemed like he didn't like him; he hadn't had any training, the adequate amount of training on the job, which was obvious, and--

Q. That was by your observation?

A. By my observation.

Q. And you had been employed there before Mr. Harris?

A. Yes.

Q. Okay.

MR. MOORE: Excuse me, Mr. Crutcher, I would to enter an objection to this entire line of testimony and move

that it be stricken on the grounds that it is irrelevant to any of the issues in this case, namely, whether or not there has been any verbal harassment of the plaintiffs by Supervisors Brazil, or Menyhart, or some other supervisor that supervised them, but there is no issue in this case that I am aware of that Mr. Birch is accused of any racial harassment by the plaintiffs. In fact, there's been testimony by one of the plaintiffs that they got, that she got along very well with Mr. Birch without incident. So I consider this whole [T. 120] line of testimony to be irrelevant to the issues and move that it be stricken.

THE COURT: Well, the motion is denied. The testimony is relevant if it shows that Mr. Birch acted with racial motive. That would be relevant because Mr. Birch was an employee of the defendant.

MR. MOORE: But, Your Honor, excuse me.

THE COURT: The Court wasn't quite finished with giving it's reasons yet, Mr. Moore. After I've finished you can object again if you wish.

MR. MOORE: I'm sorry, pardon me. I'm sorry

THE COURT: If one of the employees of the defendant is shown to have had racial animus, then there is, or may be, that others of them did.

Now, did you have something further to say, Mr. Moore?

MR. MOORE: I apologize again to the Court. Yes, sir, I feel like it is too remote for there to be any motivation attached to the defendant as to actions it took with respect to these three plaintiffs simply by virtue of what an employee contends may have occurred with respect to another supervisor against whom there is no contention that that supervisor did anything discriminatory towards

them. These are low level, low echelon supervisors, and I don't think from a standpoint of motive that you could attach a wrongful motivation to Westinghouse as to action it took with respect to these three [T. 121] employees by their supervisors by testimony of another employee as to what a first echelon supervisor, who had no contact with them, but what contact was with them was favorable as has been the testimony up to now, and determine that it was relevant for the issue, even if motivation. Now, I admit it's a matter of weight, but I believe that the weight is so slight that it makes the testimony irrelevant.

THE COURT: Well, the objection is overruled. The plaintiffs are entitled to show, if they can, a pattern or practice of racial motivation. The only way to do that, or at least one way to do it, is to present testimony about individual instances and that's what's being done here. The testimony is admissible. As to whether it has sufficient weight or not, that remains to be seen. Actually, the witness hasn't yet testified that there was anything racial about this incident. She has testified that Mr. Harris was black and Mr. Birch was white, that Mr. Birch unreasonably treated Mr. Harris, but there hasn't been anything yet to show that Mr Birch's actions were based upon race. Now, maybe that's forthcoming; I don't know, but up to now, the Court holds that the testimony is admissible. You may proceed, Mr. Crutcher.

MR. CRUTCHER: Thank you, Your Honor.

Q. (BY MR. CRUTCHER) Mrs. Donley, back to my original line of questioning. Okay. Now, once you observed the conduct of Mr. Birch and Mr. Harris there in your presence, [T. 122] Mr. Harris came to you in your Union capacity as a shop stewardess and requested that he be allowed to file a grievance; is that correct?

A. Yes.

Q. Okay. Now, once Mr. Harris filed that grievance with you, did you take that grievance up and have any discussion with Mr. Hunnicutt or anyone else in management there at Westinghouse?

A. Yes. I--after I, you know, saw what happened, I took it upon my own to write a composition about what I saw. I took it to Mr. Bob Weiler, and I told him, I said--well, this was after Mr. Harris was sent home. I told Mr. Weiler, I said, "It was wrong, the way they did him." I said, "He wouldn't give him a chance to get the glass up, he wouldn't give him a chance to work on the machine before he was asking him to do something else." He never got a chance which is really just uprooted in the mind, he couldn't, really couldn't think, you know, of what to do, because he didn't give him time enough to try to do anything and get it done. You know, because he was upset about all the machines being, most of the machines being down anyway.

And I told him, I took what I had to him. I said, "Now, Mr. Harris filed a grievance, but I wrote along with his grievance what I saw" and I explained to Mr. Weiler, I said, "Now my job as a shop steward, I say even with my job not [T. 123] being a shop steward, that affected me as well, you know."

So, he read through it, and he said "Well, I can understand, I can understand how you feel about this." He told me "Well I can understand how Leon would feel." He said, "But, Leon should have tried to do what the foreman had asked him to do."

I said, "Well, how can he do all three of them, all three of the jobs at one time, the was, he was just constantly in his ear hollering at him, telling him to do this and do that and do this, get that machine running."



He couldn't think straight, you know, with the foreman on him like he was and with the amount of training that he had. He didn't know what to do, I think I could've got down and done a little bit better than him cause he didn't know anything to do.

Q. Mr. Harris?

A. Mr. Harris didn't have, he didn't. He didn't know what to do. He had his little wrench and stuff, but it was obvious he didn't know what to do with it. He just had it in his hand.

Q. Okay. Did you take this grievance to Mr. Hunnicutt there at Westinghouse?

A. Well, when--okay--Mr. Weiler said he was going to talk to Mr. Hunnicutt and see what could be done. Okay, when maybe a week had passed, I started a petition around for [T. 124] people that knew that Leon hadn't really had the training and asked them to sign it. And I told them, I said, "Now, I'm not starting any trouble." I said, "It's just to what I saw was really wrong." And I said what I'd do is to take this to Mr. Hunnicutt, along with my composition, along with Mr. Weiler's and I would show him how we feel about Leon being terminated without having enough, you know, background about the machines, you know.

Q. Did you personally talk to Mr. Hunnicutt in regards to this matter?

A. Yes, Mr. Weiler and myself.

Q. Okay. What had you said to Mr. Hunnicutt in regards to--well, first, was Leon Harris, to your knowledge, terminated?

A. To my knowledge, he was terminated.

Q. Okay. Was this shortly after this incident that you witnessed?

A. Yes.

Q. Was Mr. Harris white or black?

A. Black.

Q. Okay. Now, once Mr. Harris was terminated, to your knowledge, and he had filed his grievance with you in your official capacity as the union shop steward, you then had a conversation with Mr. Hunnicutt?

A. With Mr. Weiler first.

Q. Okay. Did you subsequent, or after your conversation [T. 125] with Mr. Weiler, have a conversation with Mr. Hunnicutt?

A. Yes, Mr. Weiler and myself.

Q. Okay. What did you say to Mr. Hunnicutt in regards to Mr. Harris' grievance that he had filed with the Union?

A. Well, I was called to the office--well, Mr. Hunnicutt came by my group to talk to me about the petition being passed, he said he had heard about it, and I told him that I wasn't trying to start any trouble or anything like that, and I told him that if he had given me a little time that I would have been in his office, I said, because that was my purpose, to get the petition and present it to him, to show him how we felt about it, and he said that it had to go through the Union, you know procedures, and later on Mr. Weiler and I went in and Mr. Weiler spoke with Mr. Hunnicutt.

Q. Okay. Did Mr. Hunnicutt make any statements to you all in regards to the incident that led up to Mr. Harris' discharge, the one that you witnessed?

A. Would you repeat the question, please?

Q. Did Mr. Hunnicutt make any statements to you and/or Mr. Weiler as to the grievance that you all had processed for Mr. Harris in regards to the treatment that he had received?

A. Well, the only thing that I can really recall that particular day was that Mr. Hunnicutt stating that he should have done what his supervisor said, because that was his job, to do what his supervisor said do.

[T. 126] Q. Did you make any statement to Mr. Hunnicutt as to what you witnessed Mr. Harris doing?

A. Some. Mr. Weiler advised me to let him do the talking, because he, you know, I was pregnant at the time, and he told me that Mr. Hunnicutt was very intelligent with his words and that he would cross me and that I probably wouldn't be able to understand him, which was true. He was a way with words that--

Q. Did you make any statement to Mr. Hunnicutt as to what you actually saw Mr. Harris do?

A. Yes. We talked about that. We talked about that on my group and we talked about that in the office.

Q. Okay. When Mr. Harris' supervisor was giving him instructions as to the many things that he wanted the particular employee to do that you observed, was there any profane language used by either Mr. Harris or the supervisor?

A. The supervisor.

Q. Did you bring that to Mr. Hunnicutt's attention, that you heard this particular supervisor?

A. Yes, and Mr. Weiler.

Q. And did Mr. Hunnicutt respond to that?

A. He said he just didn't believe it happened.

Q. I see. Now, after you were continuing to serve in your capacity as the union shop steward, did you observe any other conduct by any other employees, supervisory or management [T. 127] employees at Westinghouse, in regards to their treatment towards hourly employees?

A. You said "hourly"--you mean like, like myself?

Q. Like yourself, yes.

A. Well, yes, I've witnessed some more grievance, some more, what I would call, wrong doing as far as, in behalf of the blacks on the job. I've sat in on quite a few grievance procedures with foremen on behalf of the employees there, and which, let's see, one was with Mr. Roger Maynard, and at this particular time, I can't recall the young lady's name.

Q. Was she white or black?

A. She was black.

Q. Okay.

A. It was having to do with the same as Mr. Harris, he wanted--Mr. Maynard had wanted her to do two jobs at one time, you know, the same.

Q. And what was the jobs?

A. One of them was sweeping and the other one was having to do, having to do with the stem and mount. Again, I'm not too sure about what happened. I'm sure Mr. Weiler has records of it.

Q. What did you witness or observe?

A. Okay. He was telling her that by him being the foreman that she was to--

Q. That's Mr. Maynard?

[T. 128] A. Mr. Maynard; being a foreman, that she was to do what he say do, you know. And I asked Mr. Loveday, I said, "Even if they trying to do two jobs to the best of her ability and do them correctly?" And he, you know, backed off and say, "Aw, well, you know, we don't give them too much work to do."

Q. Okay. What was Mr. Loveday's position at Westinghouse?

A. Mr. Loveday was the--he was the supervisor, the overall supervisor on the second shift.

Q. Okay. So he was in management?

A. Yes.

Q. And I take it that you went to Mr. Loveday in your capacity as the shop stewardess?

A. Okay. What happened, I was, I was asked to attend this, because the young lady was very upset and she was in tears, and usually when most of the blacks were in conflict with a foreman, the foreman would, I mean when they were just raving, the foreman would ask for me to sit in or come talk to them and quiet them down or, you know, something like that.

Q. Okay. Did you participate in any other grievance hearings whereby fellow black employees were involved in discussions that they have had with their supervisors?

A. Well, not as a shop steward--

Q. How about--

A. — Not as a shop steward. Just by observing and by [T. 129] them coming to me—well, I guess I—well, I represented them pretty well during the time I was there. The reason I terminated myself from the position was because I was pregnant and I had a set of twins and there were employees calling me all during the night and day and it was kind of impossible for me to leave and be with them, but when I went back I did observe a lot of things that was going on that had been talked about.

Q. Okay. What were some of these things that you were able to observe yourself?

A. Well, employees being put on the job with not enough, not enough training, pulled off to other jobs. Lot of bickering and, you know, from foreman and employees because they were having to do someone else's job while the other person--

MR. MOORE: Excuse me. Your Honor, I'd like to enter an objection on the grounds that this testimony is irrelevant unless it's placed in point of time as to who was involved. There's no way in the world that we could cross examine this witness as to these things. There's been no time frame laid, there's been no names mentioned. I consider the testimony to be so vague that it's totally irrelevant. Objection to it.

THE COURT: The objection overruled. You may cross examine her and ask her when the times were and who the persons were. Go ahead, Mr. Crutcher.

[T. 130] MR. CRUTCHER: Thank you, Your Honor.

Q. (BY MR. CRUTCHER) Okay. Mrs. Donley, you initially became an employee at Westinghouse in approximately 1972?

A. Yes.

Q. All right. And you worked, you have given me a history of the various jobs that you held?

A. Yes.

Q. And you were telling me about you were the shop stewardess there?

A. Yes.

Q. Okay. And you indicated that you had a set of twins am I correct?

A. Yes.

Q. Do you recall the birthdate of these twins?

A. Yes. January 9, '75.

Q. Okay. And after you had these twins, you were no longer shop stewardess there at Westinghouse, am I correct?

A. Correct.

Q. But you were still employed at Westinghouse?

A. Yes.

Q. All right. Now, after you had your set of twins and went to work for, back to Westinghouse as an employee, did you observe any instances of racial discriminatory treatment involving yourself or other blacks?



A. Okay. Well, I can answer that more for myself, [T. 131] because I was--okay--I was, I was having to take off some times for, you know, for a lot of illnesses, and the illnesses was due to the chemicals, you know, I found later it was due to a lot of the chemicals that I was inhaling. And my supervisor--okay--even though I told him I was sick--

Q. Who was your supervisor?

A. --and wanted to go home--this was Jim Birch. You know, I would relate to him that I was ill and needed to go home, and he would tell me--I'm sorry, Mr. Scott, Hubert Scott. He would tell me that I had to stay and work or I would be fired, you know. Okay. This is one way and pulling me off on different jobs, on my job, having me to do other jobs, you know, and still receiving the same amount of pay.

Q. Even though you were working on maybe a higher classified job?

A. Yes. Yes, and after I went on, on night shift, 11:00 to 7:00, 11:00 to 7:00 shift as a bulb loader, they still pulled me down, I got to work the bulb loader maybe three, maybe three nights. And he pulled me back and put me on the sleeving job, and which he had utility girls to do this job, but I never received a pay for that job, and then someone else came and occupied that position. He put me on as a utility girl and I never received pay for that either.

And I asked Mr. Skelly, after being on there six months, I asked him if he would qualify me, you know, for the job, [T. 132] because I was packing production, and he would not do it, but he qualified other girls whom I helped train, white, whom I helped train and I was not even qualified, he didn't qualify me for the job. But, he would not, you know, give me the qualification at all.

Q. Was this Mr. Skelly white or black?

A. He's white.

Q. Okay. These other female co-workers that you trained, were they white or black?

A. They were white.

Q. Do you recall what period of time this took place?

A. This was the year of '76.

Q. Okay. It would have been after you had your children?

A. Yes.

Q. Okay. Now, do you know the names of any of these white females that you actually train for this position?

A. Mr. Crutcher, while working at Westinghouse I made it a point not to really get too close to people, you know, because working around a lot of women, you got the gossip, it's a lot of trouble and I wanted to work in peace. Although I had the concern for the people around me, when I could help them, I didn't, but as far as getting a good relationship where I ran around with people and tried to find out a lot about their personal life, I did not do that.

[T. 133] Q. Okay. But--

A. So this is, you know, the reason I can't remember too much of whom. I did what I had to do; that's my job.

Q. Okay. Are you able to recall whether or not these females that you did train on this particular job were white or black?

A. They were white.

Q. And this job, what was the name of this job?

A. Sleeving.

Q. Sleeving? And this was under Mr. Skelly's supervision as your foreman?

A. Yes, Mr. Skelly.

Q. All right. Now, going back to what you were saying earlier, even though you were training white employees on this position, were you not receiving the proper pay for that position?

A. I was receiving--no, I wasn't.

Q. Did you go to Mr. Skelly and ask him why it was that you were not receiving the rate of pay for that job?

A. Yes. I did mention it to him, but he never had time to talk. He was always on the go.

Q. Did he give you any--did he tell you that he would get with you at some point in time later on concerning your question that you had asked him?

A. Yes, he did. He told me he would talk to me about [T. 134] it, but when I mentioned it to him again, he still didn't, did not answer.

Q. Okay. To the best of your recollection--

A. He told me at one time, on one occasion that I hadn't been back there long enough. He did make that statement.

Q. That you had not been in his particular department long enough?

A. On the sleeving long enough.

Q. Okay. Had you been there longer than the whites that you were training?

A. Yes. Because the ones that I trained became qualified for the job.

Q. And you were not qualified?

A. No.

Q. Okay. Had you been working, to the best of your knowledge, longer than Mr. Skelly had been there at Westinghouse?

A. Yes.

Q. Do you recall when you first came in contact with Mr. Skelly?

A. Let's see. Okay. It was in the year '76.

Q. Okay. Did you ever ask Mr. Skelly how long he had been employed at Westinghouse?

A. No.

Q. Okay. Well, what are you basing your answer that [T. 135] you were there before Mr. Skelly? Is it because you had not seen him while you were working in that department before?

A. Right. I had not seen him, had not heard of him and, yes, that's what I'm basing it on. I didn't see him.

Q. Okay. Do you know of any other instances whereby you observed any racial discriminatory treatment directed towards blacks as opposed to whites?

A. If I received?

Q. No, that you witnessed or you may have received?

A. Okay. Yes, I have. While I was back in the sleeving department, and, again, I'm really sorry that I don't know these people's names. Okay. Because I never tried to get that close to them, but, there was blacks in the back who were pulled off of jobs to do work that the utility girls should have been doing. And this would cause friction between them; I've seen them almost fight back there; and the utility girls would be in the bathroom, you know, doing nothing but just sitting. The reason I know this is because when I was later utility girl, a utility girl, I used to go in there, too, you see. I mean, but I would just go in there to use the bathroom. I would have to get back on my job, I couldn't stay in there and sit as long as they did, but I would go in there just to see what was happening, because every time someone had to go to the bathroom, which me that was black, I was the one that was being called, and--

[T. 136] Q. To replace them?

A. Yes, to replace them. From one machine to another one, from one machine to another one, and I couldn't understand where the rest of the utility girls were, so in the midst--in the exchange of one of the groups, I went to the bathroom, and they would be in there smoking cigarettes, or just sitting drinking coffee, or whatever.

Q. Okay. Were there any other black utility girls besides yourself?

A. Well, I--there was one who relieved with me, relieved with me, I don't know if she was a qualified utility girl.

Q. Or not?

A. Or not. Just from the saying, the friction that was between her and the foreman; she was always talking about having to do this job and do that job.

Q. Okay. During the period of time that you were employed there at Westinghouse, you have moved from an inspector packer, to a final inspector, a bulb loader, a sleeving, utility and the final inspector; am I correct?

A. Correct.

Q. And with the skills and qualifications that you received, did you ever receive any adverse evaluation by any of your foreman?

A. Would you explain the question, please?

Q. During the period of time that you were employed at [T. 137] Westinghouse, did you receive any adverse job evaluation from any of your foremen?

A. Okay. Would you explain to me what you mean what you mean by adverse?

Q. I'm speaking in terms of a foreman may have given you an indication that your work production was not making grade or you may have had too much shrinkage, or you may have been too low or, just, you know, your work performance was not at the average for the amount of production that had been prescribed for a particular job?

A. No, no.

Q. Okay. Are you still employed at Westinghouse?

A. No.

Q. How did you happen to leave Westinghouse; was it on your own or were you terminated?

A. I was terminated.

Q. Do you recall when you were terminated?

A. Well, let me see; it must have been August 31st.

Q. Of what year?

A. '78.

Q. '78. To the best of your knowledge, after you were terminated--were you terminated verbally or by written letter?

A. Letter.

Q. Okay. Do you know who you received that letter from?

A. From Mr. Hunnicutt.

[T. 138] Q. Prior to you receiving this letter, had you been counseled--

A. Excuse me, Mr. Crutcher. I called first, and I got the letter two days, because I called to inform them that I was coming back to work, and that's when I was informed that I was terminated, and I got the letter two days after this.

Q. Okay. How about relating to the Court what actually, to the best of your knowledge, led up to your being terminated there at Westinghouse?

A. Well, I was off on leave, I had surgery, and, well, the doctor, my doctor had told me that maybe it was the chemicals that was really keeping me hurting and sore, and all this, and I had a major operation and when I talked to him about it, I told him that I was ready to go back to work,



you know, and which my three months were up and I had another reoccurrence of a, you know, minor complication, and I went back to work and I got sick again, you know, it was the chemical breathing in and stuff, made me nauseated at the stomach and I vomited up, you know, that night, and I was real sore again in here.

So, the next night I couldn't in, because I was feeling real bad and I knew if I would have gone in I wouldn't have made it through the whole night, not from the way I was feeling. So, I called the school nurse--I mean, I'm sorry-- the plant nurse and asked her if I could take my vacation now because I had two weeks vacation, if I could use that as my vacation [T. 139] time, so that I could get myself straightened out. And, she was--she said, "Wilma, I'll write it down." So I say "okay". So the next night I called again and she told me I had to talk with Mr. Skelly.

Q. Who was your foreman?

A. Yes. Okay. I tried to get in contact with him on three occasions and on all three occasions he was tied up, too busy on a group.

Q. Okay. How did you try to communicate with Mr. Skelly?

A. By phone.

Q. And where did you call to try to reach him?

A. At the plant.

Q. At Westinghouse?

A. Yes.

Q. Okay. Did Mr. Skelly ever come to the phone and you give him your reason for wanting to be off?

A. He never did come to the phone.

Q. Okay. After the incident when Mr. Skelly did not come to the phone, is this when you received your notice that you had been terminated?

A. No, I called Mr. Hunnicutt, and--but I called him on another matter, on another matter, and asked me if I, if I was, you know, if I knew that I had been terminated and I told [T. 140] him no. And he asked--I asked him why. And he told me it was about my absenteeism--no, failing to report, that's what it was. And I explained to him--

Q. When you say him, who are you--

A. Mr. Hunnicutt, on the phone. I told him that I had tried to get in touch with Mr. Skelly, that he did not come to the phone. He informed me that I was supposed to have worked it out with my foreman and not the nurse, and not the nurse of the plant. And I told him, will, I could not get in touch with him. He was always too busy, or he was on another group, and one night I stayed on hold for the longest, I just hung up, you know.

Q. When you say you stayed on hold, you were holding the phone?

A. Yes.

Q. For whom?

A. Mr. Skelly to come to the phone.

Q. And he never did come to the phone?

A. He never did.

Q. Did Mr. Hunnicutt give you any response once you explained to him what had happened and that you were unable to communicate with your foreman, Mr. Skelly?

A. He told me that I had, you know, to, that I should have tried to work it out with the foreman. That the foreman needed to know ahead of time, you know, if I had planned to [T. 141] take vacation next, two week vacation next.

Q. Had you known prior to the time that you called Mr. Skelly that you may need that additional time to get well again?

A. What do you mean prior? I knew that night after I had gotten sick that I needed some more time off, because I was still nauseated, very much so.

Q. And you had just returned back to work then?

A. Yes. I worked one night and I got very--I got sick that night. Now, I pulled myself through that night because, I mean, I started getting real sick, but I pulled myself on through that night.

Q. Okay. What location in the plant were your working at this time? What was your job?

A. Final inspector.

Q. Okay. In this area where you were a final inspector, are there some gases, or chemicals, or things where you may have come in contact with?

A. Yes.

Q. Okay. Do you know the names of the chemicals?

A. No, I don't, the only thing I know is they smell. That's all.

Q. And you can smell it?

A. Yes.

Q. And you had come to work and smelled the particular [T. 142] chemicals or whatever they were and became ill that day?

A. That night, yes.

Q. That night?

A. It makes, it makes you sore, especially in your head, and dizzy sometimes, too.

Q. Okay. When you became ill that night, did you go to your foreman and let him know that you were feeling bad?

A. Yes, I did.

Q. You went to whom?

A. I told Mr. Skelly, but not only him, I told a man named Frank, who is a shop steward. I told him that the chemicals--I told him that I am getting sick. I said Mr. Skelly's not going to understand, I know, because I've already been off. I said, but I'm gonna try to pull it through this night at least, you know, because he, he had told me on one occasion that group five hadn't been getting production.

Q. Who is he?

A. Mr. Skelly. You know, since I've been gone.

Q. Group five is your group?

A. Yes. This was earlier, you know, after I got out of the hospital; I had really gotten involved, this particular group, it was hard to get production on that group. And he

placed me on that group and we got production for months at a time because my co-workers, they worked with me on the group, and we had turned our production. We got it noted [T. 143] for being the best group at one time.

And when I got out of the hospital I called him. I said, "Well, how is group five doing?" He said, "Well, it's not doing too well." and he said, "You hurry up and come on back to work so we can get the production back on the line." And I said, "Well, I'll be back as soon as I can," you know, and this is when, you know, I feel he became angry about that, you know.

Q. When you say he, are you referring to whom?

A. Mr. Skelly.

Q. Okay. In your employment there at Westinghouse, have you had an occasion to observe any other instances of possible racial discrimination in terms of employment directed towards blacks?

A. Well, from what I—what I said is basically, you know, what has happened. It has happened with a lot of the blacks, you know, a lot of the blacks; I'm sorry I can't call their names at this time, but there has been a lot of friction between the blacks and the foremen, especially on the 7:00 to 11:00 shift.

Q. Okay. In your capacity, when you served as the shop steward and related to your fellow co-workers, did you receive a lot of grievance, as such, from black workers as opposed to white workers?

A. Yes. Black workers. A lot after Mr. Harris became [T. 144] terminated, and there were some more blacks that were getting, you know, there was so many of them there, you know, I was pregnant at the time, it was about the time for me to go into the hospital, so what I did, I called Mr.

John Walker and told him that there were a lot of blacks here who were —

MR. MOORE: Objection, hearsay.

THE WITNESS: Hearsay?

THE COURT: Well, she's testifying as to what she told Mr. Walker, Mr. Moore, and she's here in the courtroom testifying, that's not hearsay. Overruled. Now, if she starts to testify as to what Mr. Walker told her, it may be objectionable.

Q. (BY MR. CRUTCHER) Okay. Continue, Mrs. Done-ly.

A. I took—there were about thirteen blacks who were having a lot of complaints.

Q. Had they come to you in your capacity as —

A. They had come to me.

Q. —as the shop steward?

A. Yes.

Q. Okay.

A. Okay. At that time, it was, it was a little bit too much to take on the responsibility, so I took them to Mr. Walker and asked him would he assist them in any way that he could.

Q. Okay. As to this number of black persons that you [T. 145] directed to Mr. Walker, to the best of your knowledge, are those black employees still employed at Westinghouse?

A. No.

Q. Can you recall any of those employees that you, that were employees at the time that you directed them to Mr. Walker?

A. I really don't. Mr. Walker has the record of them; I don't have the record of it.

Q. Okay. Now, Mrs. Donley, again going back to your termination, during the period of time that you had been employed at Westinghouse, had you personally observed any other employees who may have been off from work and yet were not terminated?

A. Who may have been off from work?

Q. Right. And not terminated like you were?

A. Not to my knowledge. They may have been off and not told me.

Q. Okay. When you were terminated, did Mr. Hunnicutt give you any alternatives in regards to being ill and unable to work other than termination?

A. No, he didn't. He didn't.

MR. CRUTCHER: Pass the witness.

THE COURT: All right, Mr. Moore, before you begin cross examination, I think it would be time to take a short recess. Mr. Marshal, Court will be in recess for twenty [T. 146] minutes.

COURT CRIER: All please rise. Court is in recess.

(Recess taken. 3:13 p.m. - 3:44 p.m.)



COURT CRIER: All rise. The United States District Court for the Eastern District of Arkansas, the Honorable Richard S. Arnold presiding, is once again in session. Please be seated and come to order.

THE COURT: All right Mr. Moore, you may cross examine.

### CROSS EXAMINATION

BY MR. MOORE:

Q. Mrs. Donley, I understood that you began your employment with Westinghouse as a bulb loader, is that correct?

A. That's incorrect.

Q. Well, excuse me. You were packing bulbs first?

A. Final inspector packer.

Q. Final inspector. And you went from—Mrs. Myra Adams placed you in the final inspector's job?

A. Final inspector packer, yes.

Q. Final inspector packer, which is a grade three job?

A. Three or four.

Q. Three or four. And that's the job you first worked at when you came to work for the company?

A. Yes.

[T. 147] Q. And Myra Adams is an assistant to Mr. Hunnicutt, is she not?

A. Yes. She works with him somehow, maybe assistant.

Q. Well, she works with him in the personnel department, does she not?

A. Yes.

Q. So when she, when you were hired, Myra Adams, one of the representatives of the company's personnel department, put you in a labor grade three or four job as final inspector packer?

A. Yes.

Q. Another employee trained you in that job?

A. Yes.

Q. And you went from that job to the job of bulb loader, is that right?

A. That's right.

Q. Bulb loader is a labor grade one job?

A. I didn't go from final inspector packer to a bulb loader.

Q. You went to a job in between those two before you got to bulb loader?

A. Yes.

Q. What was that?

A. Final inspector.

Q. And how did you get that job?

[T. 148] A. I was off—I was on leave and when I came back, I was placed on final inspector on another shift.

Q. Was that satisfactory to you?

A. Well, yes, it was all that was open.

Q. And after that, you then made your way to the bulb loader's job at the next job?

A. Yes.

Q. And a bulb loader's job, under the labor agreement, is a labor grade one job?

A. Yes.

Q. That's the easiest job in the plant, right?

A. Well, could be for some.

Q. Well, what you do, do you not, is take the bulbs out of a box and put them on rails?

A. Yes, you do that.

Q. That's what the job consists of?

A. Yes.

Q. Now, is there any thing particularly hard about that?

A. No; and once you get acquainted with all of them, there's nothing hard about them.

Q. In other words, once you get acquainted with all of the jobs out there, there's nothing really hard about the jobs?

A. No, not if your heart is in it.

Q. Okay. In other words, if you try and your hearts [T. 149] in it, and you put out the effort, all of the jobs in the plant are not hard, is what you're saying?

A. That's what I'm saying.

Q. Now you mentioned that you had obtained a position as a union steward for the Union during your employment with Westinghouse, is that correct?

A. That is correct.

Q. Do you remember when you became the union steward?

A. No, I don't. I don't remember when.

Q. How many years before your termination in 1978, on September 1 of '78, when you were terminated, how many years before that had you been the union steward, could you remember it that way?

A. Maybe a year. Maybe a year.

Q. It was in 1977 that you were a union steward?

A. No.

Q. It was before that?

A. Before.

Q. Do you know how much before?

A. '73.

Q. '73?

A. Yes.

Q. And how long were you a union steward? How long after you got the job in '73?

A. I became inactive, maybe December of '74.

[T. 150] Q. December of '74?

A. Uh-huh.

Q. And you weren't terminated until September 1 of '78?

A. Right.

Q. Okay. So, it had been almost four years since you had been a union steward in processing grievances, after you, no longer became a union steward—after you left the job of union steward before you were terminated, about four years elapsed there when you were not a union steward and before you were terminated? From December of '74 until you were terminated on or about September 1 of '78; there was about a four year period in there when just a rank and file employee and did not hold an office in the Union processing grievance?

A. No, I did not officially hold the position, but I was asked by foremans to sit in, because I was—the blacks asked me to sit in.

Q. All right. But, you were not officially working as a union steward for about four years prior to your termination?

A. Sure.

Q. And you would not be, during that last four year period of your employment, initiating any grievances

against the company on behalf of any employees, black or white, would you?

A. In the last four yars?

Q. Yes.

[T. 151] A. No, I couldn't say that. And, again, I may have my dates mixed up, because in '74 —

Q. Well, Mrs. Donley, if you were not a union steward, you would not have been initiating grievances on behalf of other employees, would you?

A. Oh, yes, I did.

Q. You did?

A. Yes.

Q. Both white and black?

A. Well, I never got any grievances from whites, grievances from whites.

Q. You never filed a grievance on behalf of a white employee:

A. Right; they've never had any trouble.

Q. But, you never filed a grievance on behalf of any white employee?

A. No.

Q. Thank you.

How many grievances did you file on behalf of black employees?

A. Well, written ones, one; that I personally wrote out, that I wrote out.

Q. You only wrote one grievance on behalf of one black employee?

A. Yes. Personally. The rest of them were, I would [T. 152] speak to the president himself, the president of the Union.

Q. How many other grievances, besides the one that you wrote up for the one black employee, did you take to the president of the Union, on behalf of black employees and ask him to write out?

A. Would you repeat the question?

Q. I believe you testified you only wrote up one grievance yourself for one black employee, but that you took other grievances for black employees to the president of the Union for him to write up, is that correct?

A. I took the one that I wrote to the president of the Union.

Q. And that's the only one that you ever filed on behalf of black employees?

A. Yes.

Q. And that's the only one that you ever took to the president of the Union and asked him to process?

A. Yes.

Q. And that was on behalf of Mr. Leon Harris?

A. Yes.



Q. How long before you were terminated in September of '78 was this grievance on behalf of Harris filed by you? When was that, how many years ago before your employment was ended in September of '78, did you initiate that grievance?

A. Maybe three and a half years.

[T. 153] Q. I believe—am I correct that none of your supervisors ever disqualified you in any of the jobs that you held while you were an employee at Westinghouse, is that correct?

A. Correct.

Q. And how many different jobs did you hold?

A. I would say five.

Q. And how many different supervisors did you work for?

A. Four.

Q. Who were they?

A. Mr. Hubert Scott, Mr. Clint Turnage.

Q. Clint Turnage?

A. Yes.

Q. All right.

A. Mr. Jim Birch.

Q. Jim Birch.

A. Yes.

Q. Mr. Bob Skelly. And as far as your performance was concerned, I believe it was your testimony that no supervisor ever wrote you up or gave you a bad rating as far as your job performance was concerned?

A. You couldn't, no.

Q. And all of these four supervisors that you worked under on these five different jobs were white, is that correct?

A. That's true.

[T. 154] Q. Now, on the Leon Harris grievance, it is my understanding that the dispute with the supervisor for which he was disciplined, was that he had been told to clean up some broken glass in his work area, which he did not do, is that right? I didn't understand that too clearly from your testimony.

A. There was glass already on the floor and the bulb loader was backing up, glass was breaking on the floor and he was insisting that Mr. Harris clean the glass up and get the bulb loader going at the same time and I guess he didn't do it fast enough for him.

Q. What was Mr. Harris' job at that time?

A. Well, it was coating.

Q. Coating?

A. That's where he was.

Q. He worked under Mr. Jim Birch?

A. Yes.

Q. Now I've been out in the plant and you've worked

is a lot of broken glass around various operations on the floor, and I've seen employees sweeping up this glass. I want to ask you this question: Is it not a common practice, and was when you were an employee at Westinghouse, for a supervisor to ask an employee to clean up the broken glass around the plant?

[T. 155] A. Would you repeat that question?

Q. Was it not a common practice for an employee to do it on his own, or to be asked by a supervisor, when you worked there, to clean up broken glass that was on the floor?

A. Yes, it's common.

Q. Did Mr. Harris finally refuse to sweep up the broken glass altogether? He just decided he wasn't going to do it any faster than what he was doing it?

A. Okay. The broken glass was not the only thing that he was being told to do at that particular time, there was more; to get the bulb loader working.

Q. And Mr. Birch didn't think that he was —

A. And put boxes, and put boxes on the conveyer belt.

Q. —and Mr. Birch didn't think that he was doing these things fast enough?

A. No; Mr. Birch was upset himself.

Q. Pardon?

A. Mr. Birch was upset himself.

Q. He was upset himself?

A. Yes. Because there was a number of machines down, and group four happened to be one of them.

Q. In other words, he was just not in a good humor at that particular time when he was getting on to Mr. Harris? He had problems going on that got him upset?

A. There were a number of machines down.

[T. 156] Q. And he was hurrying, trying to get the thing straightened out and he got angry with Mr. Harris because he didn't think he was doing his job fast enough?

A. The jobs.

Q. The jobs?

A. Fast enough.

Q. And that's what it consisted of?

A. Yes. That's what it was, consisted of along with the fact that he did not have the adequate amount of training on the coating machine at that time.

Q. Now, Mrs. Donley, after you took the grievance to Mr. Weiler and Mr. Weiler and you talked to Mr. Hunnicutt, and you went through the procedures of the grievance sections of the labor agreement, Mr. Hunnicutt denied the grievance as a result of your meeting, is that right?

A. Yes.

Q. And he told you the reason as to why he was denying it?

A. Yes.

Q. And after that, the Union did not file any request for arbitration to take that grievance to an impartial arbitrator, did it?

A. Well, when we left, Mr. Weiler said that he would work more on the case.

Q. All right. Did you ever follow up with Mr. Weiler [T. 157] afterwards, following your meeting with Mr. Hunicutt and find out what he did or didn't do about working on the case and taking it to the next step under the labor agreement?

A. Well, Mr. Weiler and I communicated by phone on several occasions. I didn't—I didn't try to pursue the issue any more because I was getting ready to go into the hospital to deliver, and after I delivered I didn't really have the time to get in it like I wanted to, and this is why I went to Mr. Walker, and Mr. Weiler was one of the ones who recommended that I go to a lawyer with it.

Q. Now, wait, Mrs. Donley, you're getting a little bit ahead of me. A union steward—as a union steward, you are aware, under the labor agreement, that when an employee is terminated, the Union has absolute right to demand that that termination case be taken to an impartial arbitrator to be heard?

A. I was not really that familiar with the procedures, because I was picked really as a—I was picked as a shop steward because of my concern for the people, and I worked closely with Mr. Weiler on behalf of the blacks, because he told me that they felt that he was being prejudiced against them.

Q. That Mr. Weiler was?

A. Yes.

Q. Being prejudiced against the blacks? Who told you [T. 158] that?

A. Yes. He told me himself, that the blacks felt this.

Q. That the blacks felt that the president of the Union, Mr. Weiler, was prejudiced against them?

A. Yes.

Q. And you were appointed to help him communicate with the black employees?

A. Yes. These were reasons that I was given for being appointed. I never was trained as a shop steward; the only thing I went by was what I saw happening within the plant.

Q. But you don't have any knowledge that Mr. Weiler took Mr. Harris' grievance to arbitration, do you?

A. No, I don't, and I don't have any knowledge that he did, but he did tell me on the phone that he didn't feel it be any good.

Q. Mr. Harris told you on the phone that he didn't feel that it would be any good, or Mr. Weiler told you?

A. Mr. Weiler.

Q. That he didn't think that would do any good?

A. That's right.

Q. In other words, he didn't, he didn't think there was any merit to taking it to arbitration, that you'd lose it if you went to arbitration? Is that what he said; or meant?

A. I don't know what his, what his real reasons were [T. 159] for it, but he told me himself that Mr. Hunnicutt was, was very brilliant and very bright and he'd find some way to get around it.

Q. And that's the reason he gave you as president of the Union for the Union's decision not to take the case to arbitration?

A. Yes. He did that earlier, too. One reason—one of the main reasons that I tried, that I sought help from Mr. Walker, you know.

Q. And he sent you to Mr. John Walker?

A. Well, he advised, he say, "I don't blame you for getting a lawyer," or "I wouldn't blame you for getting a lawyer." And he's told me several times—

Q. Now, wait a minute. Let me ask you this. Mr. Harris never filed a charge with Equal Employment Opportunity Commission, did he?

A. Well, I don't know about any of that, I only know about my personal dealings with him.

Q. Well, you didn't—did you—I thought you interested in Mr. Harris' grievance to the point that you circulated a petition in the plant, went to Mr. Weiler, got him involved in it, but after that point you don't have any further information as to what the outcome of his case was? He never filed a charge with EEOC, did he?

A. Again, I told you that I only dealt with what I saw [T. 160] and knew to do, the best of my ability as a shop steward. I was never trained.

Q. Mr. Weiler never trained you as to the duties of a shop steward?



A. No, I was never trained. So I only went on what I saw personally.

Q. He never, Mr. Weiler and the Union never told you what the rights were of an employee to get a grievance to arbitration under the labor agreement?

A. No. I was never trained.

Q. You stated that at one time you were on a labor grade one job, I believe as a bulb loader, and that on occasion you might be transferred temporarily to a higher rated job to work, by Mr. Skelly, is that right?

A. To—say that again.

Q. Well, I thought I understood your testimony, that you had been in a labor grade one job of bulb loader, hand, and that on occasion Mr. Skelly might transfer you temporarily to work in a higher rated job?

A. Yes. Not on occasion, I worked the bulb loader about three nights and from then on it was higher.

Q. He might move you to a—was this—what was your permanent job at that time, when you received these temporary transfers from Mr. Skelly to other jobs?

A. What was my job supposed to have been?

[T. 161] Q. Yes. Yes.

A. Bulb loader.

Q. Bulb loader. All right. And occasionally he would move you where he needed you to another job that might have a higher labor grade?

A. Yes.

Q. Would this happen every night, or once a week, or how often?

A. From six months one time, to three months, months at a time. Months and months at a time.

Q. It would have been a month to six months at a time, you were moved to another labor grade?

A. Yes.

Q. And it would be a higher labor grade?

A. Yes. Higher than a one.

Q. And is it your testimony that you didn't get the rate of pay for that higher labor grade when you were on this other job for as long as six months at a time?

A. I didn't.

Q. You did not?

A. I did not.

Q. Did you ever say anything to Mr. Weiler, the Union, or to Mr. Hunnicutt?

A. I talked with Mr. Skelly and Mr. Weiler, and other employees also mentioned it to Mr. Skelly.

[T. 162] Q. And what did he tell you?

A. He told me that I hadn't been back there long enough, hadn't been on the job long enough.

Q. Well, now, you are aware that when you are temporarily transferred to a job, under the labor agreement ~~between the union and the company that you had to be in a job for four~~

hours or more before you got the higher rate of that job, you were aware of that?

A. Yes.

Q. So if you were transferred to another job temporarily, and you worked less than four hours in that job, you would not be entitled to the higher rate of that job, would you?

A. That's true.

Q. Can you tell me the dates on which you were transferred to a higher rated job, the name of the job, and the length of time that you worked in that job?

A. I cannot give you the exact dates, you know, when I was moved from one job to another. I know I stayed in sleeving six months or more, and —

Q. What year was that?

A. This was in '76.

Q. 1976?

A. Uh-huh.

Q. You were transferred — how long were you in the [T. 163] sleeving job in '76?

A. Okay. Maybe, maybe seven or eight months; maybe more.

Q. That's a labor grade three job?

A. Yes, I would say so.

Q. And you had been transferred from a labor grade one job?

A. Yes.

Q. During that period of seven to eight months in 1976 as a sleeving operator, is it your testimony that you were paid at the labor grade one job rate?

A. I was still in the number one.

Q. What was that, what was the rate at that time?

A. \$3.48; I think it was.

Q. All right. Tell me of the other instances when you were transferred from the labor grade one job to a higher rated job, that you were in the job for over four hours and were not paid the rate of the higher job?

A. Well, as you mentioned—to be true before, Mr. Skelly moved me when he needed me, you know, so I cannot remember the exact dates. I only know that I stayed on bulb loader three nights. And from that time on, I was sleeving, utility girl, and final inspector. And each night that I was moved to a job, I was there all night, not half a night on there.

[T. 164] Q. Well, what year did this occur in?

A. '76.

Q. This also occurred in 1976?

A. Yes.

Q. And you stated that on this one instance that you went to sleeving job, you were there seven to eight months. Now, how long were you transferred to the utility girls job in 1976?

A. Utility? Well I would say maybe three, four months; but you would have to be familiar with the way a utility girl works, because I may be a utility girl for three hours and then may have to occupy a machine, a sleeving machine the rest of the night. So, he just really bumped me wherever he needed me, that's where he putted me for how long, he —

Q. All right. Now, but in 1976 if you were a utility girl for only three hours during the shift, you would not be entitled the higher rate of pay of the utility operator, would you?

A. That's on some occasions.

Q. Could you answer my question yes or no?

A. Well, I don't understand the question.

Q. Well, my question is, if you were transferred from a labor grade one job to a utility operator's job in 1976, and you were in the job for less than four hours, you would not have been entitled to the higher rate of pay of the utility [T. 165] operator, would you?

A. Uh—

Q. Yes or no?

A. I would have to explain that question. I couldn't answer yes or no, because I was giving you an example of how we were bumped around. I was not stating that I was on the job just three hours. I was giving you an example of how the utility girls are moved around.

Q. All right. Well, you think then that your amount of time in utility girls job in 1976 was three or four months? Does this mean that you went over to utility girls job in 1976 and stayed for three or four months when in, when, really, you were a labor grade one bulb loader?

A. Yes, this is what I am saying, that I occupied that position.

Q. Every night for three or four months you were sent over to utility girl to work?

A. Yes. I would come in and if that's where he needed me, that's what he needed me doing, relieving, that's what I did.

Q. All right. As a — how long did you occupy the job of final inspector in 1976?

A. Okay. Seems like you're trying to crowd all this in one year and it wasn't just crowded in one year.

Q. I'm sorry. I thought that your testimony was that [T. 166] you did, that the period of time you received these transfers was in 1976.

A. Well, not just 1976, no; this was up until termination; throughout the years, you know.

Q. Well, what period of time did it cover?

A. Throughout the years, from '76 up to termination. That's what I was doing.

Q. I show that in — effective as of March 14, 1977, according to the records in your personnel file, that you became a final inspector for the company on the third shift in a labor grade three job and were paid at the rate of \$4.46, is that right?

A. Yes, they did award me a, a final inspector job.

Q. Would that be about the right time, March 4, 1977 — March 14?

A. Well, I can't remember, I can't remember if that is the date, but if that's what — yeah, sounds right. I see no reason why you have to lie about it.

Q. Okay. So, from March 14, 1977 to the time of your termination, you were in the final inspector classification of labor grade three and were paid the rate for final inspector?

A. That's right. But, I did not stay on that job, even though it was awarded to me at that time. I was still being moved wherever he needed me.

[T. 167] Q. But you received the rate of the final inspector after that date until the time of your termination, did you not?

A. Yes.

Q. Okay. So, if he had moved you to some other job of a lower classification, you would have continued to receive the rate of a final inspector job from March 14 until the time of your termination on about September 1, 1978?

A. Yes.

Q. I show here on January 16, 1976, from a record taken from your personnel file, it shows that you were a final inspector as of that date, you were in a labor grade three job and that you were paid the authorized top rate of \$3.80.

A. That was when?

Q. Effective January 16, 1976.

A. That I was a what?

Q. That you were a final inspector working under Mr. Jim Birch and that you were paid at the rate of \$3.80 an hour, which is the top rate for final inspector?



A. Okay. Well, it seems though I have my dates mixed up. Would you let me —

Q. And that you worked in this job until June 21, 1976, when you went from the job of final inspector to the job of bulb loader, hand, at your own employees request?

A. Oh, yes, I requested it.

[T. 168] Q. So, you requested the transfer from a higher rated job of final inspector, which you held on January 16, 1976, to the lower rated job of bulb loader which you obtained on June 21, 1976?

A. Yes, I requested it.

Q. So you downgraded yourself at your own request?

A. Yes.

Q. Now, you stated that there were other black employees who Mr. Skelly took from a lower rated job and put on a higher rated job; did you state that?

A. No, I didn't state that.

Q. You didn't state that?

A. No.

Q. All right. Then maybe I'm incorrect in that what I'm trying to get at is, you stated that Mr. Skelly qualified employees for certain jobs who were white, but he didn't qualify certain employees who were black, and that you had trained some of the white employees; is that what you said? I'm confused.

A. What I said that was, I wasn't speaking of other employees when I made such statement, I was speaking of, you know, myself. That he didn't qualify me.

Q. For what job?

A. Sleeving.

Q. What do you mean that he did not qualify you for [T. 169] that?

A. For sleeving. I had been back there I felt long enough. I was putting out production, and I also trained, helped to train some of the newer, white employees for that job.

Q. When was this? What year was this?

A. This had to be the year '77.

Q. 1977?

A. Yes.

Q. And what did—what was your job at that—that year, what was your job that year? What was your job in 1977?

A. Okay. Final inspector.

Q. You were final inspector. Now, that was a labor grade three job, right?

A. Yes.

Q. But, that Mr. Skelly did not qualify you for that job?

A. Right.

Q. Now, the sleeving operators job is also a labor grade three job, right?

A. Right.

Q. So, whether you worked as a sleeving operator or stayed as a final inspector and only worked temporarily as a sleeving operator, you would have received the same rate of pay?

[T. 170] A. Okay. But that wasn't the issue during that time, either about the job. I wanted to work in the sleeving since I had been there for a long time, because I had complications up on final.

Q. But my question was that you would not have suffered any loss of pay?

A. In seventy—in seventy—

Q. In '77 when you were a final inspector and you were working temporarily as a sleeving operator, but you did not get qualified, you said, by Mr. Skelly, as a sleeving operator. You wouldn't have suffered any loss of pay yourself?

A. Well, no, not if the pay is the same.

Q. Now, did a vacancy ever come open back there as a sleeving operator?

A. Not to my knowledge.

Q. No vacancy ever came open?

A. Not to my knowledge.

Q. All right. Now, had a vacancy come open as a sleeving operator, you could have bid on that job, Mrs. Donley, and if you had had the greatest amount of seniority of the employees that bid on that job, you would have been awarded that job, would you not?

A. Yes.

THE COURT: I don't think I quite understand that, Mr. Moore—

[T. 171] MR. MOORE: Well,

THE COURT: —maybe I don't understand the term 'qualify.'

MR. MOORE: Well, that's what I'm, I was—let me ask this: In other words, whether or not Mr. Skelly had qualified you temporarily while you worked as a sleeving operator or not, if a vacancy had occurred back in the sleeving department, and you had bid on that job and you had more seniority than anybody else that bid on the job, the company would have awarded that job to you?

THE WITNESS: Well, I'm sure they would have if there had been some openings, if I had more seniority. That's the general procedure.

Q. (BY MR. MOORE) All right. So that Mr. Skelly never kept you from getting a sleeving operators job? He didn't prevent you—

A. I don't know. That's a difficult question for me to answer.

Q. Well, you never had a vacancy back there for you to bid on, I believe you testified to, right?

A. Yes. But there—there were machines that did not have operators, whom he used the other utility girls to work there, along with myself. And the next thing I knew, there were new girls on the job. Now, how he did this, I don't know.

[T. 172] Q. Well, what were the names, what were the names of the new girls that were on the job?

A. I mean, that I stated earlier that I didn't get close enough to people to find that out, that much about them.

Q. But, Mrs. Donley, if you felt that Mr. Skelly was keeping you from getting a job back as a sleeving operator and you saw other girls appear back there, new operators on the job, are you telling me that you did not take any action to find out who those other girls were, to see if they bidden on those jobs as sleeving operator and had greater seniority than you?

A. Well, no, at that time I didn't, because I was back there already the majority of the time anyway.

Q. And isn't it a fact that when a job is vacant, it's posted in the plant, and any employee in the plant can bid on that job?

A. Well, I never saw one up on the board.

Q. You never saw a job posted on the board to be bid on during the entire period of your employment?

A. That is not what I'm saying. I'm saying that during this time I never saw a sleeving job on the board.

Q. All right.

A. And I guess the reason I didn't pay any attention to it was because that I was back there all the time anyway. I mean, it was just like I have the job anyway.

[T. 173] Q. But, what I'm asking you is, if there had been a vacancy back there, it would have been posted on the board and anybody in the plant could have bid on it, including you?

A. Yes. Yes.

Q. Okay.

THE COURT: Mrs. Donley, let's see if I understand now, when you say, "During that period of time you were back there anyway."

THE WITNESS: Yes.

THE COURT: Were you being paid just at a level one?

THE WITNESS: Yes, during this time I was at a level one, but the job seemed like it was mine anyway because I was back there. So, I didn't pay any attention to the board. As far as I'm concerned, that was my job.

Q. (BY MR. MOORE) Well, what period were you back there then?

A. I—if you can give me the exact date, what the record states that I went over, then I can be more precise with your answer.

Q. What period of time did you go back and work temporarily as a sleeving operator?

A. Three nights after I went on 11:00 to 7:00, whatever the date was that I went over.

Q. All right. And at this time you were classified as a final inspector?

[T. 174] A. Class—I was a bulb loader. I went over as a bulb loader.

Q. Well, when was that?

A. When I went over?

Q. Uh-huh.

A. Well, you see, I just asked you; so I really don't know the exact date. You've got the records.

Q. So, it's your testimony that you don't know when you were transferred temporarily from a bulb loaders job to a sleeving operator?

A. From a bulb loader to a sleeving?

Q. Yes.

A. I worked the bulb loader three nights after I went over on the 11:00 to 7:00 shift, and from that night on I was in the sleeving department.

Q. Well, what period of time?

A. I don't understand how — what you mean by that.

Q. Well, when, when?

A. You, are you still asking me for a date?

Q. Yes, Ma'am.

A. I can't give that to you.

Q. You were off on several illness disabilities while you were employed with Westinghouse, is that correct?

A. That's correct.

Q. When was the first one?

[T. 175] THE COURT: Mr. Moore, before we get into that, it's getting along towards the time when we were supposed to go look at the plant. I wonder if it wouldn't be bet-



ter to finish with this witness at this point instead of interrupting her testimony because she would have to come back tomorrow. Do you have any thoughts about that?

MR. MOORE: Yes, sir. I was going to try to wind this down, but unfortunately, the reason for the lengthy cross examination is, her testimony was—I have not deposed her before and what I heard today is what I've heard for the first time. It wouldn't have been quite so lengthy were it not for that, but I could—I've still got a few more questions.

THE COURT: I think maybe we better finish with Mrs. Donley and it will be just as well to go look at the plant tomorrow, wouldn't it?

MR. MOORE: We could do that. Have you got any other witnesses?

MR. CRUTCHER: Sure, I have four other witnesses.

MR. MOORE: Well, I can finish with Mrs. Donley in just a few minutes and we could go look at the plant, but I don't think we can get through with all his four witnesses, so maybe we better just put the whole thing off until tomorrow.

THE COURT: Well, I wasn't expecting that we would finish with all of his four witnesses today. I just want to [T. 176] avoid the inconvenience to her of having to come back tomorrow.

MR. MOORE: All right. I believe I can finish up here in just a few minutes.

THE COURT: All right, sir.

MR. CRUTCHER: Your Honor, may I say this here.

THE COURT: Yes.

MR. CRUTCHER: I would like to redirect for about five minutes when Mr. Moore finishes.

THE COURT: You will have that opportunity.

Q. (BY MR. MOORE) Mrs. Donley —

A. Yes.

Q. —you were terminated not because of your poor performance as an employee on the job, but because of poor attendance; is that right?

A. I was told by Mr. Hunnicutt that the reason for my termination was failing to report.

Q. But it was attendance problems, not performance problems?

A. No, it wasn't performance.

Q. All right. Did you receive any warnings about your attendance before you were terminated?

A. Yes.

Q. Did you receive both a verbal warning on March 17, 1976, about poor attendance?

A. Well, I can't remember the date, but I did receive [T. 177] a verbal warning.

Q. Did you receive a written warning after that concerning your attendance?

A. Yes.

Q. Did you receive after that a three day furlough or suspension on account of poor attendance?

A. Yes.

Q. And did you receive a final warning before you were terminated, concerning attendance?

A. No.

Q. Do you remember if, on November 17, 1976, that you received a written disciplinary report from Mr. Bob Skelly to the effect that, "Employee is given a written warning for excessive absenteeism and lateness in the presence of the shop steward, Frank Forrest, accompanied by a three day disciplinary furlough. She is further warned that if her absenteeism is not corrected immediately, further and more severe disciplinary action will be taken which will ultimately result in her termination"?

A. Okay. I remember that meeting.

Q. Did he tell you that?

A. Yes.

Q. Let me show you a copy of a letter and ask you to look at it and see if you recall receiving that letter?

A. No, this wasn't the type letter that I received.

[T. 178] Q. Well, let me show you a green receipt that's stapled to it, dated 9/1/1978, delivered, with your signature attached to the letter. That isn't the same letter that you received from Mr. Hunnicutt?

A. It doesn't look like the same letter.

Q. Is that your signature on the green card that's attached to it?

A. This is my signature, yes.

Q. You received a letter from Mr. Hunnicutt telling you of your termination?

A. Yes.

Q. And it listed in it the reasons for your termination?

A. Yes.

Q. And those reasons had to do with absence?

A. Yes.

Q. Well, what about this letter that I just showed you, that is different from the one that you received?

A. It seems like it is.

Q. You think that is now the letter, after having looked at it?

A. I'm not saying I think it is, but it could have been. I don't remember on my letter, this —

Q. What?

A. This part. (Indicating)

Q. An outline of your prior record?

[T. 179] A. Right. Maybe I overlooked it, maybe.

Q. You could have overlooked it?

A. Could have.

Q. Did you save your letter?

A. No.

Q. You threw it away?

A. I don't know what I did with it.

Q. Did you give it to Mr. Walker?

A. No. I don't think I did.

Q. Okay. After you were terminated, did you file any grievance over your termination?

A. No.

Q. Did you file any charges with Equal Employment Opportunity Commission over your termination?

A. No.

Q. You stated that you talked to Mr. Walker, was this after you were terminated?

A. No, I talked with Mr. Weiler after termination.

Q. Weiler. He's with the union?

A. Yes.

Q. And the union filed no grievance over your termination?

A. Well, Mr. Weiler told me that it seemed helpless. He didn't feel that anything could be done about.

Q. Mr. Weiler talked you out of it, filing a grievance?

[T. 180] A. I'm not saying he talked me out of it.

Q. Well, he told you—he didn't think he could do anything about it?

A. Not he, but the fact that there was not anything could be done about it.

Did you ask him to do something about it?

A. No. He made some statements to me when I talked to him about it. The supervisors had been discussing it, you know, on first shift, and I really just gave up hope about it, judging from other cases and other things that had happened with blacks and things.

Q. You stated that you gave Mr. John Walker the names of thirteen black employees that you felt had given you complaints of racial discrimination?

A. I took these people to Mr. Walker.

Q. You took them to him?

A. Yes.

Q. What are their names?

A. I don't know. I don't know.

Q. You can't remember a single one of those thirteen people?

A. Well, Mr. Leon Harris; I don't—Mary, a young lady named Mary and—

Q. Was that after this suit was filed in 1974?

A. After the suit?

[T. 181] Q. Yes. when was this?

A. This was during the year 1974, I think. We just went to talk to him about it, he and Mr. Kaplan.

Q. As far as you know, no charges of racial discrimination were filed by Mr. Walker on behalf of any of these thirteen employees, including Mr. Harris, were there?

A. Okay. It wasn't, it wasn't too long after that that I delivered and I couldn't—I didn't get farther into it.

Q. Would your answer to my question though, be "no"?

A. Beg pardon?

Q. The question was that I asked, after you took the thirteen black employees to Mr. Walker, including Mr. Harris, that no charges of racial discrimination were filed against the company, were there?

A. I don't know.

Q. To the best of your knowledge, though, what you do know—

MR. CRUTCHER: Objection, Your Honor. I think the witness answered Counsel's question by stating she did not know.

THE COURT: Overruled.

Q. (BY MR. MOORE) As far as you do know, none were filed on behalf of these employees, were there?

A. I don't know.

Q. Well, you don't know, you can't name one of the [T. 182] thirteen employees in whose behalf a charge was filed, can you?

A. Leon Harris.



Q. He didn't file a charge with EEOC, did he?

A. I took him to Mr. Walker, with what I saw and my composition and whether he—if he farther got into it with Mr. Walker, I don't know, because when I had my babies then, and I couldn't deal with that.

Q. But you never heard of any charge being filed on behalf of Mr. Leon Harris, or any other of the thirteen employees with the EEOC, did you?

A. No.

MR. MOORE: Thank you.

THE COURT: Any redirect, Mr. Crutcher?

MR. CRUTCHER: Yes, Your Honor, just a few.

# REDIRECT EXAMINATION

BY MR. CRUTCHER:

Mrs. Donley, during your employment there at Westinghouse, did you occupy the position of a final inspector on more than one occasion?

A. Yes.

Q. Okay. When you first went in, your first job was a final inspector packer, am I correct?

A. When I was first employed at the plant?

[T. 183] Q. Yes.

A. Final—inspector packer final.

Q. All right. Then you then moved from that position to a final inspector?

A. Yes.

Q. Under Mr. Birch?

A. Yes.

Q. Okay. Now, what position, grade position, is that final inspector?

A. Final inspector?

Q. Yes.

A. Three.

Q. All right. Did you later move to be a bulb loader?

A. Yes.

Q. Okay. Who was the supervisor then?

A. Mr. Bob Skelly.

Q. All right. Now, what was the grade on that bulb loader?

A. One.

Q. Okay. Why did you request to take a down shift, that is, from the final inspector to bulb loader which was a one?

A. I wanted to be home during the day with my twins. It was kind of difficult finding a babysitter and they were getting sick, you know, staying sick, and I just felt I needed [T. 184] to be home with them during the day. Knowing that they were asleep at night I was, you know, content and able to work on my job with, you know, at ease.


Q. Okay. When you moved to the sleeving position, what was that grade?

A. Three.

Q. All right. And who was the supervisor there?

A. ~~Mr.~~ Mr. Skelly.

Q. All right. Now, you were then, or you moved yourself to a utility position, am I correct?

A. Incorrect. 

Q. Okay. What was the next position that you occupied between the sleeving and the final inspector?

A. Utility.

Q. Okay. Did you bid on the utility job position?

A. Well, I was going to bid and he told me that there were already too many girls.

Q. Who was he?

A. Mr. Skelly.

Q. All right. Now, was — when you were a sleever in sleeving, you worked there in what — '76, '77?

A. Yes.

Q. All right. When you worked in that position, did you train other white employees?

A. Yes.

[T. 185] Q. All right. Now, when you trained those white employees, do you know where they were placed?

A. On a sleeving job. On, you know, somewhere on sleeving, one of the machines.

Q. One of the machines?

A. Yes. I didn't—I didn't train them by myself. If I was a utility girl, when it was time for me to relieve, I was doing the training with her at that time.

Q. Okay.

A. And then there were times that he did put me there permanently as well, but these on different nights, not all in the same night.

Q. Okay. While you were there training people on the sleeving job, as a utility operator, did Mr. Skelly tell you that there were some vacancies in that particular job?

A. No.

Q. Did he—did you ask him whether or not there were any vacancies in that job?

A. Yes. I did ask him when I could come back there and remain permanently.

Q. Did he reply to you?

A. No, he laughed it off.

Q. Okay. Tell me this here, what do you mean by "being qualified" for a job? Is it—is qualified mean that you're able to bid and hold a job?

[T. 186] A. Qualified means that you're able to take out production. And there were times when the machine broke down that the bulbs would still come down the conveyor, and I was able to keep up with—usually the machine

packed the bulbs out and this is going at a fast pace. There have been times when the machine broke down that I had to get up there and hand pack them and I was as fast as the machine, and this was one reason he kept me back there.

Q. Okay. Did Mr. Skelly tell you that you were not qualified in sleeving?

A. Yes.

Q. You were not qualified, but yet, you were working back there?

A. Right.

Q. And in working back there, you actually assisted in the training of some white females?

A. That's right.

Q. And you witnessed them being placed in that same department that you were training them on?

A. Yes.

Q. And Mr. Skelly did not tell you of any vacancies back there?

A. No.

MR. CRUTCHER: I have no further questions.

THE COURT: Now, Mrs. Donley, at this time, I just [T. 187] want to get the time sequence straight, at the time that Mr. Crutcher was just talking about, and I believe Mr. Moore also examined you on it, you were being paid as a level one as a bulb loader?

THE WITNESS: Yes.

THE COURT: Any recross, Mr. Moore?

MR. MOORE: Yes, sir.

# RECROSS EXAMINATION

BY MR. MOORE:

Q. What time was this? What year was this? What date?

A. I'm sorry, I just can't remember the date that I went on.

MR. CRUTCHER: Let me--let me ask you this--

THE COURT: Just a minute, Mr. Crutcher. Mr. Moore has got a right to his recross examination. Are you finished with it, Mr. Moore?

MR. MOORE: Not quite, Your Honor.

THE COURT: You may proceed.

Q. (BY MR. MOORE) You cannot remember the date either; when it first occurred or when it last occurred?

A. I can't remember the date that I went over because I was having a lot of complications at that time, and especially trying to find a babysitter, trying to be at work on time; the only thing that was on my mind was trying to get on third [T. 188] shift so that I could be home during the day and my babies can be asleep while I was at work at night.

Q. My other question was then, if a vacancy had occurred in the sleeving operators job, that vacancy would have been posted on the employees bulletin board for all employees to see and bid on, right?

A. Right.

Q. And it was your testimony, if I'm not mistaken, that while you were either a final inspector or a bulb loader, whichever, you don't recall there being a vacancy in the sleeving operators job posted on the bulletin board which you could have bid into?

A. I never paid it any attention at that time, because I was in the sleeving area anyway.

Q. But wasn't it--but you weren't being paid at a rate for a job grade three? Wouldn't that have concerned you?

A. Well, I didn't know that I was going to be back there that length of time. He said--

Q. My question was, once you were back there a length of time, if you were being paid less than a labor grade three job, wouldn't that have concerned you?

A. Yes, it did concern me.

Q. And you never filed any grievance over that, did you, with the company?

A. No, I didn't at that time.

[T. 189] MR. MOORE: That's all I have.

THE COURT: Any further redirect, Mr. Crutcher?

MR. CRUTCHER: Yes.

# FURTHER REDIRECT EXAMINATION

BY MR. CRUTCHER:

Q. Now, Mrs. Donley, when you were back there in that position, were you constantly working in that area?



A. Yes.

Q. Okay. If, in fact, any vacancies arose back there, the ladies that you were training, were they already back there or were they trained and then moved into the area?

A. Well, they just popped up from nowhere. I, I, like I say, I don't understand how it happened, they were just there training.

Q. You were already back there working?

A. Yes.

Q. And so you just trained them on that job?

A. Yes.

Q. And you asked Mr. Skelly, am I correct, whether or not you were qualified for the job?

A. Right.

Q. And he told you what?

A. He told me that I hadn't been back there long enough.

Q. To be qualified?

[T. 190] A. That's right. And I told, I told him, I said, "Well, I'm putting out production, I can do what they do, what the other operators back there can do, and more." I asked him, I say, "How many operators can operate a machine when it's down and catch all the bulbs like I did, and go faster than the machine?"

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[T. 437]

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W. T. HUNNICUTT, JR. recalled as a witness, by and on behalf of the Defendant, having already been sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Would you state your name again for the record?

A. My name is W. T. Hunnicutt, Jr.

Q. Mr. Hunnicutt, you're the same Mr. Hunnicutt that testified yesterday in the trial of this case?

A. Yes, sir, I am.

Q. And what is your present occupation with the company?

A. I am personnel relations manager of the Westinghouse Electric Corporation, Lamp Operations Division Plant on Roosevelt Road in Little Rock, Arkansas..

Q. How long have you been in this job?

A. Since December of 1974.

Q. Mr. Hunnicutt, when was the Little Rock Lamp Division plant opened for business?

[T. 438] A. In 1948.

Q. What is the product or products that's manufactured at the plant?

A. Incandescent electric light bulbs or lamps, as they're known in the industry, is the primary product of our plant. This consists of household type bulbs or lamps. The range is a 15 watt through a 150 watt.

We also make three-way lamps; we make sun lamps, spot lamps, flood lamps, heat lamps, rough service lamps, possibly another type or two. But primarily we manufacture the household type of incandescent lamps.

Q. In the year 1970, approximately how many employees were employed totally at the Little Rock Lamp Plant?

A. In 1970, we had, oh, about 740 employees.

Q. About how many employees totally are employed at the plant today, or let's say, let's take 1977?

A. Total, around 800 total.

Q. All right. Are they--have the employees been represented by any labor union since the plant opened in 1948?

A. Yes, sir, they have.

Q. About when did the employees first become represented by a labor union?

A. To the best of my knowledge, it was in the early 1950's sometime. I'm not sure of the exact date.

Q. All right. And what group of employees at the [T. 439] plant are represented by a labor union?

A. Oh, production, maintenance employees.

Q. All right. What union is it that represents these employees?

A. They are represented by the Local 1136 of the International Brotherhood of Electrical Workers.

Q. And what -- let me now turn to your duties and responsibilities, and ask you what they are in connection with being the personnel relations manager?

A. My general duties are, I'm responsible for, oh, labor relations, employee relations, employment, employee benefits, custodian of records, all of the personnel records of employees, security. Basically, that is my primary areas of responsibility.

Q. All right. Let's first talk for a moment in connection with your duties as representative of the company for labor relations. Do you have duties in this regard that require you to negotiate agreements with the labor union that represents the production and maintenance employees?

A. Yes, sir, I do.

Q. All right. At this time, I would like to see if we can get some of our exhibits in the record by stipulation. And if not, then I would ask Mr. Hunnicutt to identify them and use him as the witness for the Defendant to introduce them through.

[T. 440] The first exhibit that we would like to offer by stipulation on our direct case would be the labor agreement from the Westinghouse Electric Corporation and the International Brotherhood of Electrical Workers' Union, Number 1136, effective 1970 until 1973.

MR. CRUTCHER: No objection.

THE COURT: All right. Let it be received.

(Defendant's Exhibit Number 2.)  
(received in evidence. )

[T. 460]  
(Testimony of W. T. Hunnicutt)

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MR. MOORE: I now offer into evidence Defendant's Exhibit 35 A through V, which constitutes the employee payroll authorization changes on employee Christine Vaughn from her date of hire on July 13, 1970, until her period of employment of January 1, 1979.

THE COURT: A through what, Mr. Moore?

MR. MOORE: V, as in Victor.

THE COURT: V. Thank you.

Any objection?

MR. CRUTCHER: No objection.

THE COURT: Let them be received.

(Defendant's Exhibit Number 35 A)  
(through 35 V received in evidence.)

MR. MOORE: I now offer into evidence what I am marking as Defendant's Exhibit 36, which is a change in employee status and employee evaluation, dated January 20, 1971, with regard to employee Christine Vaughn, prepared by her supervisor at that time, Mr. O. D. Brazil. Also attached to that as part of this exhibit is information concerning the jobs in which the employee was then qualified and showing where the employee moved to after she was bumped from her job as sealex machine operator at that time due to a reduction in force.

MR. CRUTCHER: No objection.

THE COURT: Let it be received.

(Defendant's Exhibit Number 36,  
(received in evidence. )

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 37, which constitute handwritten notes prepared by supervisor C. T. Turnage, dated March 9, March 23, March 24, 1971. This constitutes notes prepared by Mr. Turnage concerning his evaluation and meetings with employee Christine Vaughn prior to his disqualification of Miss Vaughn as a sealex operator at that time.

THE COURT: Any objection?

MR. CRUTCHER: No objection, Your Honor.

THE COURT: Let it be received.

(Defendant's Exhibit Number 37)  
(received in evidence. )

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 38, constituting notes also of Mr. C. T. Turnage, prepared on March 30, 1971, concerning his evaluation and conversation of Miss Vaughn's performance as a sealex operator on or about the time he disqualified her from that job.

THE COURT: Any objection?

[T. 462] MR. CRUTCHER: No objection, Your Honor.

THE COURT: Let it be received.

(Defendant's Exhibit Number 38,  
(received in evidence. )

MR. MOORE: Defendant's Exhibit 39, which I am now offering into evidence, are also notes of Mr. C. T. Turnage, dated April 15, 1971, in which Mr. Turnage describes a meeting he had with employee Vaughn during the period immediately prior to her disqualification as a sealex operator.

MR. CRUTCHER: No objection, Your Honor.

THE COURT: Let it be received.

(Defendant's Exhibit Number 39,) (received in evidence. )

MR. MOORE: I'm now offering Defendant's Exhibit 40, which are notes prepared by Mr. C. T. Turnage on April 19, 1971, in which he describes the meeting in which he notified Christine Vaughn, in the presence of a shop steward, of her disqualification from sealex operator at that time and the reasons for the disqualification.

MR. CRUTCHER: No objection.

THE COURT: Let it be received.

(Defendant's Exhibit Number 40,) (received in evidence. )

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 41, which is a change in [T. 463] employee status and employee evaluation, dated April 19, 1971, and prepared by Mr. C. T. Turnage, concerning his disqualification of Miss Vaughn at that time from sealex machine operator and her movement from that job to the vacant job at that time of bulb loader, hand.

THE COURT: Any objection?

MR. CRUTCHER: No objection.



THE COURT: Let it be received.

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 42 --

THE COURT: Mr. Moore, excuse me, but let me ask you a question.

MR. MOORE: Yes, sir.

THE COURT: This may be a little ahead of the game, but I recall Miss Vaughn testifying about her being disqualified and she said she later learned -- as I recall, she testified that she later learned that she was qualified to be a sealex operator. I notice that this Exhibit 41 says "Disqualified as sealex machine operator, not eligible to hold this job in future." And then she was transferred to bulb loader, hand.

Can you throw any light on that question?

MR. MOORE: I can through Mr. Hunnicutt, and we -- would the Court like to do it at this time?

THE COURT: No, that's all right. I just wanted to -- just wanted you to know that I'd like to hear about that at some point.

[T. 464] MR. MOORE: Yes, sir. Well, this might be as good a time as any while we're on it. And I believe there's a document that's already been introduced into evidence -- well, I haven't gotten to that yet.

Let me go ahead. I'm going to come back to that point and I will explain that to the Court through Mr. Hunnicutt.

THE COURT: Thank you.

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 42, which is a document

that is dated on April 25, 1974, showing that on that date there was a reduction in force and employee Jacqueline Randall, who had a seniority date of 6-23, 1970, displaced employee Christine Vaughn the job that Christine Vaughn held at that time and Christine Vaughn's seniority date was July 13, 1970.

THE COURT: Any objection?

MR. CRUTCHER: No objection, Your Honor.

THE COURT: Let it be received.

(Defendant's Exhibit Number 42,)  
(received in evidence. )

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 43, which is a document dated April 25, 1974, and signed by Christine Vaughn, showing that after her displacement by Miss Randall, she in turn displaced another employee at this same time by the name of Barbara Snyder, who had a seniority date, January 10, 1973, whereas Miss Vaughn [T. 465] had a seniority date of July 13, 1970.

THE COURT: Any objection?

MR. CRUTCHER: No objection, Your Honor.

THE COURT: Let it be received.

(Defendant's Exhibit Number 43,)  
(received in evidence. )

MR. MOORE: I now offer into evidence what I'm marking as Defendant's Exhibit 44, dated February 24, 1977, and constituting the request for transfer by Christine Vaughn, the bid post notice of a utility operator's sig, S-I-G, job, labor grade four, and the acceptance notice by Christine Vaughn of this job on the third shift.

MR. CRUTCHER: No objection, Your Honor.

THE COURT: Let it be received.

(Defendant's Exhibit Number 44,  
(received in evidence. )

THE COURT: Mr. Moore, it's about time for us to have lunch.

MR. MOORE: All right, sir. I'm down to that explanation now. We'll reserve that.

THE COURT: Let me suggest with respect to the remaining exhibits, and there seem to be probably twenty more, I want to commend both of you for the expedition with which they have come into evidence. And if during the luncheon recess, Mr. Crutcher, if you would look over the remaining -- [T. 466] the remainder of the list, I'm sure you may already have done this, but look over it again and we have a few more exhibits with respect to Miss Vaughn and than a list with respect to Miss Gee. If you have no objections, you could so state en block, so to speak, and then Mr. Moore could offer and state into the record what each of them is. And we might save a little time that way.

MR. CRUTCHER: Yes, Your Honor.

THE COURT: So, Mr. Marshal, we'll be in recess until 1:30.

COURT CRIER: Everyone rise.

Court is in recess until 1:30.

(NOON RECESS 12:00-1:30 p.m.)

[T. 467] COURT CRIER: All please rise. Court is again in session. You may be seated.

THE COURT: You may proceed, Mr. Moore.

MR. MOORE: Your Honor, at this point the following exhibits which the defendant wishes to introduce into evidence as Defendant's Exhibits 45 through 62. These are going to be introduced into evidence by stipulation of the parties.

THE COURT: All right. We need to have you state for the record what each one is.

MR. MOORE: All right, Sir. Defendant's Exhibit Number 45 is a bump sheet notice of December 8, 1975, when the employee Vaughn was declared surplus in department as utility operator on the third shift.

I would at this time like to take some testimony from Mr. Hunnicutt with respect to this particular exhibit after showing it to the Court; and I direct the Court's attention to the list of jobs which is on the exhibit and which Miss Vaughn is purportedly qualified by virtue of prior experience, satisfactory.

THE COURT: One of which is sealex machine operator?

MR. MOORE: That is correct, Your Honor, on [T. 468] this sheet. The exhibit will show also, Your Honor, that it bears her signature on the back side -- Miss Vaughn's signature, indicated that she would have seen that sheet.

THE COURT: And the witness is going to explain the apparent contradictory statements?

MR. MOORE: Yes, Your Honor.

Q. Mr. Hunnicutt, I show you what has been introduced as Defendant's Exhibit Number 45, which is a bump sheet on employee Christine Vaughn, and direct your attention to the column under the heading -- those jobs to which the employees could return by virtue of previously shown satisfactory experience.

Explain first just generally what this sheet is and how it functions in your job selection process.

A. Yes, sir. This is a sheet that is prepared at the time that we have a reduction in force, listing the employee's name who is being displaced, why the person is being bumped, what the person's present job is; then indicating the choice or options the employee has as far as selecting a job after being bumped.

Q. All right. Now, what had happened to Christine Vaughn on the date that this bump sheet was prepared?

A. A position of utility operator SIG 111.8 on third shift was declared to be excess. Her position was declared surplus and she was bumped. She was put through [T. 469] the reduction in force procedure at that time.

Q. Now, on the column Return To Job Previously Performed (Satisfactory Experience), what job is listed on that column?

A. On this form under this heading are listed Job Number 328, Packing Operator Sleeving in Department 111.8; Job Number 101, Bulb loader, hand; Job 327, Final Inspector, Department 111.8; Job 316 Mount Inspector, 111.8; Job 415 Sealex Machine Operator, Department 111.3.

Q. All right. My question now is, as of this date Miss Vaughn had previously been disqualified on that sealex machine operator's job. Can you explain why that sealex machine operator's job was listed on this exhibit as being a

job that she had satisfactorily performed previously and could return to?

A. Yes, sir. These jobs previously performed satisfactorily are taken from a small personnel history card maintained in our Personnel Relations Department. My assistant, Mrs. Myra Adams, prepared this bump sheet and when she listed the jobs that Miss Vaughn had previously held satisfactorily she failed to note on the card that she had previously been disqualified as a sealex machine operator and inadvertently listed that job again here as one that she on which she had satisfactory experience and was eligible to go to during a reduction in force [T. 470] procedure.

Q. All right. Are you saying that that is a mistake on that document?

A. Yes, sir, this is a mistake on this document.

Q. Is there anything on this exhibit to indicate that Miss Vaughn had seen this particular exhibit at the time that she was declared surplus in the job and bumped into this other job?

A. Yes, sir, Miss Vaughn signed this form on the back side on December the 8th, 1978.

[T. 471] Q. When an employee is disqualified from a particular job, are there any conditions that could occur in the future which would place them in a position to be able to bid on a job from which they were disqualified in the past?

A. Yes, sir, there are.

Q. How can that occur?

A. If an employee gets additional training or experience or education, or anything that will benefit them and enable them to perform the job, they would again be allowed to bid on that job and be considered for it.



Q. All right, sir.

THE COURT: Would she be allowed to try out for it, so to speak, and demonstrate in practice that she was able to do the job?

THE WITNESS: No, sir, she would not unless there was some indication that she had had some additional experience that would have enabled her to perform the job.

Now, if she held a similar type job that required the same, some of the same types of skills, then we could consider this in allowing her to again go on the job. But we would have to have something to indicate to us that her ability to perform the job had in some way changed since the time she had been disqualified.

THE COURT: Well, what would be similar? Are there other jobs there, you mean, that are similar to sealex that [T. 472] she might perform and demonstrate that she was suitable to try out on sealex again?

THE WITNESS: I can't think of one just offhand like this. There are times that an employee will come to us and advise us that they have had some additional training in a certain area and again ask to be considered for a job. And if that was the case, of course, we would review it with a person at that time.

THE COURT: I'm trying to understand how would she get any additional training? I mean, if she -- unless she went to work for another light bulb factory on a sealex machine, where would the additional experience come from or where could it come from?

THE WITNESS: On a job such as this, sir, it is difficult to think of a type of position where a person could get additional training, because some of these jobs, a person is disqualified, at times it may be because of a lack of manual



dexterity, that they're just not able to make the movements that are required to do the job. And it's difficult to say what a person could do to again get to the point to where they could satisfactorily perform this job.

THE COURT: Is a sealex still a grade four?

THE WITNESS: Yes, sir, it is.

THE COURT: What does that pay now?

MR. MOORE: Is it in the labor contract?

[T. 473] THE WITNESS: I don't believe I've got a key sheet here with me.

MR. MOORE: Let me show you the labor contract.

THE WITNESS: Sir, unless I've missed something in this computation, this would be \$5.32½ an hour at this time.

THE COURT: And the job she's in now pays \$5.40, according to the stipulation.

THE WITNESS: Well, I made a mistake then on this computation, because the job she's in now is a class three job. And a class four job would pay more than that. But I'm trying to work this back from the key sheet effective July the 19th, 1976, and adding in the increases since that time. And somewhere I made a -- I made a mistake on this, because that is a class four job.

THE COURT: All right, sir. And packaging operator-sleeving is a class three?

THE WITNESS: That is a class three job.

THE COURT: All right. Well, Mr. Moore, if it was ever necessary to make these computations, I suppose they could be made?

MR. MOORE: Yes, sir.

THE COURT: From the documents that are in evidence?

MR. MOORE: Yes, sir.

THE COURT: Well, if I understand you then, Mr. [T. 474] Hunnicutt, if she just came to you and said, "I was disqualified on April 19, 1971 as a sealex operator, and I've been working for you now eight years since that time in various jobs and I've performed satisfactorily, or at least I'm still here and I haven't been terminated, it must have been fairly satisfactory, and I now think that I'd like to try that sealex again. I think my attitude is better", or, "I've been here longer and I'm more used to it", or for whatever reason, but your testimony is that you would not, under your existing practices, permit her to do that. She would have to show some concrete experience relevant to being a sealex operator?

THE WITNESS: Yes, sir, that is true under our existing practices.

THE COURT: Thank you, sir.

MR. MOORE: The next exhibit that's been stipulated to is Defendant's Exhibit 46 A and B, which is a discipline report, September 26th, 1972, of supervisor O. D. Brazil, for tardiness and absenteeism. Actually, it's for excessive lateness as to Christine Vaughn. And attached to it is her record of absenteeism lateness for the period during which the discipline report was issued.

THE COURT: All right, sir, that is received.

(Defendant's Exhibit Number 46,)  
(received in evidence. )

MR. MOORE: The next stipulated exhibit of the [T. 475] Defendant is 47 A and B, which is a discipline report issued by supervisor Ray or Roy Crowder to Christine Vaughn on May 30th, 1975, for excessive lateness. And attached to it is the absentee record indicating that during the past twelve months, the employee had been late twenty-five times.

THE COURT: Let it be received.

(Defendant's Exhibit Number 47 A and)  
(47 B received in evidence. )

MR. MOORE: The next exhibit of the Defendant is Number 48 A and B, a discipline report prepared by supervisor R.W. Skelley on April 13, 1976, for employee Christine Vaughn, and attached to it, the absentee record for the years '74, '75, '76 and '77, and indicating that since June 6, 1975, the employee had been absent twelve days and late on fourteen different occasions.

THE COURT: Let it be received.

(Defendant's Exhibit Number 48 A and)  
(48 B received in evidence. )

MR. MOORE: Defendant's Exhibit 49 A, which is offered into evidence by stipulation, is a discipline report prepared by supervisor Robert Skelley on employee Christine Vaughn, dated October 13, 1977, as 49 A and attached to it is the absentee record for year 1977. And the report shows that since April 19, 1976, the employee has been late twenty-two times and absent twenty-nine days on eleven separate [T. 476] occurrences, excluding a thirty-eight day period spent on the disability roll.

THE COURT: Let it be received.

(Defendant's Exhibit Number 49 A)  
(received in evidence. )

MR. MOORE: The next exhibit of the Defendant is 49 B, a discipline report prepared by supervisor Robert Skelley, dated June 23, 1978, with regard to employee Christine Vaughn, indicating that since October 13, 1977, the employee had been late twelve times and absent five days.

THE COURT: Let it be received.

(Defendant's Exhibit Number 49 B)  
(received in evidence. )

MR. MOORE: The next exhibit of the Defendant offered into evidence by stipulation is Number 49 C, which is a training and skills survey taken by the company on or about December 3, 1976 of all female employees. And this particular exhibit pertains to the answers given by employee Christine Vaughn, who was then a sleeving operator on that date.

And we would direct the Court's attention to the answers given by the Plaintiff, Christine Vaughn, on this report to questions 22, 23, 24.

THE COURT: Let it be received.

(Defendant's Exhibit Number 49 C)  
(received in evidence. )

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[T. 486]

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Q. (BY MR. MOORE) Mr. Hunnicutt, we have seen through the introduction of a number of exhibits various kinds of records that are kept by the company in the personnel department with regard to employees in the

production and maintenance section. Would you tell the Court what kinds of records do the production supervisors themselves prepare with respect to the employees in the production and maintenance unit?

A. Yes, sir. They prepare and maintain in their possession absentee records for each employee under their supervision; and they maintain in their possession absence records for the current year and the immediate preceding year.

[T. 487] After this time lapses, then the records are forwarded to the personnel relations office for inclusion in the employee's personnel file.

They also maintain records of overtime work by employees; they maintain this in their possession. They prepare notes of discussions with employees and forward them to the personnel relations office for placement in the employee's personnel file.

Q. Let me stop you there, if I may. These notes that are prepared, what kind of notes do they prepare?

A. When an employee -- or when a supervisor has a discussion with an employee pertaining to some disciplinary matter or to some problem relating to the performance of a job, the supervisor just makes a note for the file of this discussion and sends it to our office to be included in the employee's file, just as a memo to the file.

Q. Does the supervisor give the employee a copy of that note?

A. No, sir, he does not. This is just a memo to the file.

Q. Does the supervisor, when he prepares such a note, reflect in the note, as a matter of practice, whether or

not the shop steward was present at the time that the counseling or warnings was given orally?

A. Yes, sir. If a shop steward is present, it is considered to be a formal disciplinary action. If a shop [T. 488] steward is not present, it is just an informal discussion between the supervisor and the employee.

Q. What is the purpose of the company in having its supervisors prepare these kind of notes to the employee's personnel file?

A. So that there will be a record maintained of discussions a supervisor has had with an employee in the event that some action has to be taken at a later date. That may mean removing an employee from a job or it may mean taking disciplinary action, such as suspending an employee for a period of time or even termination. But the supervisors are asked to do this so that we can be assured that they have taken steps with the employee to try to correct whatever the problem may be before they take serious type disciplinary action.

Q. And if you take some sort of disciplinary action, is it a possibility that the employee's labor union might, on the employee's behalf, file a grievance under the labor contract?

A. Yes, sir, they certainly have the right to do this.

Q. Are these records ever used in connection with the processing of those grievances with the union?

A. Yes, sir, they are. If a grievance is filed, during the hearings on the grievance we have to bring out the records and discuss with the labor union's grievance committee the [T. 489] actions, discussions, and so forth, that have taken place prior to the action over which the grievance was filed.

Q. What about formal written warnings or disciplinary reports, is that another type of record that is



maintained by the company and kept in the employee's personnel file?

A. Yes, sir, it is.

Q. How -- what is the procedure for preparing and communicating one of those to an employee, if they do?

A. When a supervisor desires to give a formal written warning to an employee, he requests through my office that a warning be prepared. And he gives us the information as to the purpose for the warning. And all of the formal written warnings are typed in the personnel relations office and they are reviewed by either myself or my assistant before the supervisor gives this warning to the employee.

Q. How many shifts have you had at Westinghouse since 1970?

A. We have operated on a three shift basis since 1970.

Q. And what are the times of those three shifts?

A. The plant begins operation on Sunday night at 11:00 o'clock with the third shift; it operates from 11:00 at night until 7:00 in the morning. Our first shift begins at 7:00 in the morning and operates through 3:00 p.m. in the afternoon. The second shift starts at 3:00 p.m. in the afternoon and operates until 11:00 o'clock at night.

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[T. 496] Q. Mr. Hunnicutt, with respect to job disqualification, suppose an employee is either a new employee who is working for you for the first time in a brand new job, what is the procedure for either qualifying or disqualifying that employee?

A. The supervisor evaluates the employee's progress.



[T. 497] Q. During what period of time for a new employee?

A. A new employee is in a probationary status, one that's initially hired, for a period of sixty working days. At the end of this sixty working day period, the employee is either released as a probationary employee or becomes a permanent employee and is added to our seniority list as a permanent employee.

Q. Now, let's take a non-probationary employee, an old employee, who has transferred jobs and moved into a new job, what is the method for evaluation, qualification or disqualification, however you want to put it, for such an employee in a new job?

A. This person is put with an experienced employee for training. The supervisor then follows the progress of training and he expects to see some progress made and improvement made in an employee's performance.

We have some jobs that are what we call "machine paced jobs." By this I mean that a machine indexes or the positions change at a given rate of speed. An employee then would have to keep up with the machine. And if the employee failed to keep up, it would be missed positions on the machine which would be loss of production or it would be, you know, breakage of parts or getting the parts in the machine incorrectly, which could mean shrinkage or wasted materials.

And if an employee is -- during the training period, [T. 498] he's expected to show an improvement as the training period progresses. And if the employee reaches a point where this improvement is no longer noted and it appears that no progress is being made, then the supervisor discusses the situation with the employee and tries to find if any additional type of training or help would solve the problem and then ultimately advise the person that if he or

she is unable to fulfill the full scope of the job, then disqualification will have to be the result.

Q. Is there any set period of time that a non-probationary employee is under evaluation for qualification in a new job to which they've transferred?

A. We don't have a set period of time in which a person is expected to either make it or go back. Some people learn jobs faster than others. And a person would be expected to be showing an improvement. But if a person maybe was learning a little bit slower, yet was still showing an improvement, then we could give the person a little longer time to learn the job.

Q. All right. Thank you.

Suppose, for example, an employee is disqualified in a job by his or her supervisor, is that disqualification subject to the grievance procedure of the parties' labor agreement?

A. Yes, sir, it is.

[T. 499] Q. All right. Let's take this example a little bit further. Just how would that operate insofar as the grievance procedure that would be followed under the labor agreement should an employee be disqualified or failed to be awarded the job to which they thought they were entitled or disciplined for some reason, and the employee, or the union on their behalf, filed a grievance, what set of events would be set in motion under the parties' labor agreement?

A. The first step would be a discussion by the employee and/or his or her shop steward with the supervisor who had taken the action against the employee.

If this discussion failed to resolve the issue, then the grievance would be reduced to writing and given to the supervisor of the employee.

This supervisor then would have to answer the grievance in writing and return it to the union representative. If this answer was not satisfactory, the union had the option to appeal the grievance to the next step of the grievance procedure, which is the personnel relations level of our local plant. Then it's my responsibility to schedule a meeting with the local union's grievance committee at which the grievance will be discussed.

After discussion of the grievance, then an answer is given to the local union as to the disposition of the grievance at that level.

[T. 500] If this level answer is still not satisfactory to the union, they have the option to appeal the grievance to the division level of the Lamp Operations Division.

Q. Would that be Mr. Kelleher, whose name appears on some of the exhibits?

A. Mr. J. K. Kelleher is the division manager of personnel relations.

Q. All right. What happens if the union is still unsatisfied with Mr. Kelleher's decision?

A. They have --

Q. Let's use the example of the disqualification from a job grievance first.

A. In a disqualification job?

Q. Yes, sir.

A. They have the option to write a letter to Mr. Kelleher asking that we submit the question to arbitration.

Q. That is the union?

A. The union.

Q. All right. All right, before I go ahead on this point. let me ask you this, now, Christine Vaughn, one of the plaintiffs in this action, was there ever any grievance filed on her behalf by the union grieving her disqualification as a sealex machine operator?

A. No, sir, not to my knowledge.

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[T. 520]

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Q. All right. Mr. Hunnicutt, let me now ask you about another subject. Are you familiar with supervisor O. D. Brazil?

A. Yes, sir, I am.

Q. What shift does he supervise?

A. Well, at this time he is a general foreman; he's on our first shift.

[T. 521] Q. All right. Back in the period of time of 1974 and 1975, what was his position with the company then?

A. '74, I believe he was a master mechanic on our first shift. Earlier than that, he was a supervisor on our second shift in the simplex department. I think this went back to, oh, '71 or '72.

Q. What would have been his position when he was supervising employee Christine Vaughn?

A. He would have been a supervisor, as I remember, on our second shift, either in the simplex department or in the standard groups.

Q. Do you know about when that would have been?

A. Oh, in 1971, '72, somewhere in that time frame.

Q. Did you ever receive any complaints from Miss Vaughn concerning Mr. Brazil's supervision of her?

A. Yes, sir, I believe I have.

Q. Do you remember what the substance of those were and what you did, if anything, when you got such a complaint?

A. As nearly as -- as nearly as I can remember, Miss Vaughn thought that he was, or said he was, she felt he was picking on her. And he had been, I believe as she explained it, he was harassing her about her attendance, her lateness or --

Q. Had he issued her a late written disciplinary report at that time?

A. Yes, sir, he did issue her one about this time.

[T. 522] Q. All right. What did you do, if anything, after she made that complaint to you?

A. I talked to Mr. Brazil and discussed with him about, you know, the type of complaint and talked with him about discussions he had with employees, and in this case, with employee Miss Vaughn.

Q. Had you ever received, at or about that same time, any complaints from any other employees concerning Mr. Brazil?

A. Oh, yeah. Yeah.

Q. What was the -- can you tell us about that?

A. I had a complaint from a machine attendant about that time about Mr. Brazil.

Q. Was he white or black?

A. He was white.

Q. Do you remember his name?

A. Yes, sir. It was a man by the name of Keathley, Tom Keathley.

Q. What was the nature of his complaint?

A. Oh, about Mr. Brazil's mannerism and the way he expected him to do something. And he thought he was expecting him to do more than he could, as I remember. General dissatisfaction.

Q. Did you receive any other complaints besides Vaughn's and Keathley's, that you can recall, concerning Mr. Brazil --

A. Yes, I received --

Q. --at about that time?

[T. 523] A. Well, even since then. I don't remember that particular time, but I have over the years. Mr. Brazil, I guess you'd consider him to be, you know, a rather strict supervisor. And there -- there have been a number of occasions when I have had employees voice some complaint to me about Mr. Brazil.

Q. Have you -- have you, on more than one occasion, talked to Mr. Brazil about this and gotten his side of the complaint?

A. Yes, sir, I have. And I've even discussed with him about possible ways, maybe alternate ways to talk with people or to maybe try to help him see what somebody else was thinking that may have raised a question. But we've had several discussions about this type thing.

Q. All right. What is Mr. Brazil's position at the present time?

A. He's general foreman on our first shift.

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[T. 535]

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Q. All right. Mr. Hunnicutt, now let's turn to another subject, and that is Wilma Donley.

Let me show you what I am going to mark as Defendant's Exhibit 63, and ask you to identify it. What is this?

A. This is a copy of the authorizations for change in payroll for Miss Wilma Donley from the time that she was employed at Westinghouse on August the 31st, 1972, until she was terminated on August the 28th, 1978.

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(Testimony of W. T. Hunnicutt)  
[T. 559]

### CROSS EXAMINATION

BY MR. CRUTCHER:

Q. Mr. Hunnicutt, earlier in your testimony you have referred to Defendant's Exhibit Number 2, which was the agreement between Westinghouse Electric Corporation, Lamp Division, of Little Rock and International Brotherhood of Electrical Workers, AFL, CIO, Local Unon Number 1136, Little Rock, effective June 11th, 1973.

In that agreement, there is a reference in 3.4, Section B, in regards to transfer requests, and it states that first preference for filling vacancies will be given to the [T. 560] most senior employee who has requested transfer to the job and shift prior to the time the vacancy occurs.

Now, while this collective bargaining agreement was in effect, did you instruct all your supervisors to inform all of their employees of the request procedure?

A. No, sir, we did not.

Q. Did you have any particular notices to the employees that the request-transfer procedure could be followed and that they could request a vacancy even though it was not present at that time, and once a vacancy occurred, then they would be considered?

A. Yes, sir. We gave new employees an excerpt from our labor agreement detailing the transfer procedure upon their being hired. And we had a -- have a board in our plant with a listing of our job titles on that and it contains instructions on how a person requested a transfer to another job.

Q. Okay. How about your employees that you had prior to June 11, '73, did you inform them of this particular procedure that they could implement in regards to vacancies that had not arrived?

A. Sir, I believe that provisions was the same probably from the first labor agreement that was in effect at Westinghouse.

Q. Can you tell me whether or not any other employee [T. 561] requested a transfer, other than Mrs. Mitchell, in regards to a vacancy that you had testified to in regard to Defendant's Exhibit Number 60, which was the particular vacancy that she had requested when Mrs. Gee, I believe, became disqualified.

A. May I look at that exhibit, please?

Q. Yes.

A. This particular job was not filled through the request procedure; it was posted on the bid posting board and Mrs. Mitchell bid on the job.

Q. Okay. Had Mrs. Mitchell requested a transfer prior to the job being posted?

A. No, sir. There were no requests on file at the time this job requisition was turned in. Subsequently, the job was posted on the bid board for all employees to have a chance to bid on it.

Q. Okay. Turning now to Mrs. Vaughn, the particular job that Mrs. Vaughn initially filled upon her date of hire on 7-13-70 was a sealex operator. And what grade is a sealex?

A. Labor grade four, sir.

Q. Okay. What factors are used to determine the job grade level?

A. In our plant, we use the overall job comparison method, whereas all the factors of the total job comparison system are used. A job is compared with the jobs in the next higher labor grade, the next lower labor grade, the other [T. 562] jobs in the labor grade to be sure that this is the proper slotting position for the job, considering the total aspect of the job.

Q. Okay. Is it the normal procedure when you have new employees come in that they go into a higher grade as opposed to a grade level one job?

A. At the time Mrs. Vaughn came in, we hired employees directly off the street for jobs that were open. Sometimes these were in higher labor grade jobs; sometimes they were in lower labor grade jobs. But this was the job for which we hired a person. When the opening came up, there were no requests on file or else the persons who had requests on file turned them down, then the job was posted on the board for a period of twenty-four hours; and if there were no persons bidding on the job at that time, the job became open and we hired from the outside to fill the position.

Q. Okay. With that job being a grade four, would it be safe to say that it would be a little bit more difficult or require a little more training or skill as opposed to a grade one job?

A. Yes, sir.

Q. Okay, then. Well, does the training period vary as to the particular job grades?

A. Yes, sir. Some jobs require longer training periods than others.

[T. 563] Q. Okay. What is the specific training period for a grade one job?

A. We don't have a specific period for it. It depends on the job, on the person. Some people require a longer period for a job than others.

Q. Okay. How about the grade four, what's the specific training period on it?

A. There is no specific training period. We don't say that a person has to become proficient on a job in a fixed period of time or else go off the job.

Q. Okay. I show you here a copy of Defendant's Exhibit 35, which is the pay records of Mrs. Vaughn that indicated the type and grade of jobs that she was occupying at the time, and looking through that exhibit, are you able to determine whether or not she received any rate increases on that job from July 13th, 1970, which was her initial date of hire, until January 25th, 1971?

A. Yes, sir, she did.

Q. Okay. And also looking at those same records, do you see in those records where Mrs. Vaughn was disqualified as a sealex operator on or about April 19th, 1971, while working for Mr. Turnage?

A. Yes, sir.

Q. Okay. Now, immediately before Mrs. Vaughn's disqualification, had she come to you concerning any difficulties [T. 564] that she may have had with her supervisor, with Mr. Brazil?

A. I'm afraid I don't understand that, if you said immediately before she was disqualified. She didn't work for Mr. Brazil immediately before she was disqualified.

Q. Okay. Who was the supervisor that she worked for?

A. At the time of her disqualification?

Q. Yes, sir.

A. She was transferred to a supervisor, worked for a supervisor on our third shift on January the 25th, 1971, by the name of Mr. Beckton. However, I believe she worked for Mr. Turnage at the time of her disqualification.

Q. Okay. Well, then prior to her being disqualified by Mr. Turnage, had he indicated to you that Mrs. Vaughn was not performing satisfactorily on the sealex machine?

A. Yes, sir. He had sent notes to our department on more than one occasion indicating that he was having a problem with Miss Vaughn's performance on her job.

Q. And yet the records on Mrs. Vaughn indicate that she was receiving pay increases as a sealex operator?

A. She had received her pay increase to the top rate of a sealex operator's position on November the 16th, 1970, when she worked for Mr. Brazil.

Q. Okay. Well, when she was working for Mr. Brazil, did she come to you with any difficulties that she was having with Mr. Brazil?

[T. 565] A. Yes, sir, she did. At one time, I'm not sure where this was the time; I'm not sure of the exact time, but she did.

Q. While employed under Mr. Brazil's direction, is that correct?

A. Yes, sir, she did.

Q. Do you recall the circumstances surrounding her visit to you?

A. As nearly as I can remember, sir, Mr. Brazil had given her a disciplinary warning for absenteeism or lateness.

Q. Okay. And what actions did you take after Miss Vaughn came to you concerning Mr. Brazil's disciplinary warning that he had given to her?

A. As nearly as I can remember, I talked with Mr. Brazil about this.

Q. Okay. After this conversation of Mrs. Vaughn with you, did a representative of the EEOC come to the plant and discuss this matter concerning Mrs. Vaughn?

A. Not to my knowledge, sir.

Q. Okay. And after Mrs. Vaughn moved from the sealex machine, from looking at her records which have been identified as Defendant's Exhibit 35, are you able to see whether or not she received any pay increases in the Packaging Operation Division?

A. In which operation, sir?

[T. 566] Q. Packaging Operation, which would be sleeving.

A. Oh. Yes, sir, she did.

Q. Okay. And looking at those same records, does the record reflect whether or not Mrs. Vaughn was bumped on or about April 29, 1974?

A. Yes, sir, she was.

Q. Okay. You referred earlier on direct that you only had one bump sheet, and that was the one around about 1978, that had on it where Mrs. Vaughn was qualified to perform a sealex machine job.



Now, after she got bumped in April of '74, do you have any records to show whether or not she was qualified to go back to the sealex machine at that time?

A. Sir, I don't believe, as I remember, I said that was the only record that I had seen on that. I said, on that particular record where she was bumped in December of 1978, it did show that. Possibly it showed the same thing on another record; I don't know. That is the only one that I have reviewed though.

Q. Okay. But there is a possibility that there may be another bump sheet in regard to Mrs. Vaughn, other than the one that you had testified to on the record occurred in 1978?

A. There were other bump sheets. I believe I saw one covering a bump that was made earlier than that. I thought this one was made back around '71 or '72. Perhaps [T. 567] I was looking at the wrong date on it.

Q. Do you know whether or not — strike that question.

Did you personally inform Mrs. Vaughn, back in 1974 when she was bumped, as to whether or not she was qualified to serve as a sealex machine operator?

A. No, sir, I did not.

Q. Okay. Now, after she was disqualified from the sealex machine operator job, do you know when she was given any opportunity to re-train as a sealex machine operator?

A. She was not given any opportunity to re-train, to the best of my knowledge, sir.

Q. Well, then how could she be qualified in 1978 to be a sealex machine operator?



A. She wasn't. As I explained yesterday, that entry was inadvertently made on the bump sheet in error; it should not have appeared there.

Q. So when an employee is bumped from a machine or — excuse me, when an employee is disqualified from a particular job, then how can the employee become qualified again for that job.

A. If an employee is disqualified on a job such as the sealex machine, this is normally because of a problem in coordination or manual dexterity or some means of just handling the movements that are required to do the job.

And in this case, I can't remember a case where [T. 568] someone else has gone back on the job again.

Q. Okay. What are the functions of a utility operator?

A. A utility operator fills in for other operators during breaks, during lunches, especially when a section of the plant is involved in continuous operation where we do not shut the equipment down for lunches or breaks. These utility operators relieve the other operators so they can go to lunch or to go on breaks. They also fill in during periods of absence when other employees are absent.

Q. What's the grade level of a utility operator?

A. In the simplex department, it's a labor grade four.

Q. Okay. Now, when a person —

THE COURT: Excuse me a minute, Mr. Crutcher.

What does "S-I-G" mean, Mr. Hunnicutt?

THE WITNESS: That is an abbreviation for "Simplex incandescent groups."

THE COURT: All right. So she was then in the simplex department on March 28, 1977, when she became a utility operator?

THE WITNESS: Yes, sir, she was.

THE COURT: Is "simplex" a type of bulb?

THE WITNESS: No, sir. The simplex, the incandescent group refers to the automated type equipment that we have in the front section of our plant. That's just [T. 569] a trade or the corporation designation for that type of equipment.

THE COURT: So it refers to the kind of equipment rather than the kind of product?

THE WITNESS: Yes, sir, it does.

THE COURT: Are there sealex machines in the simplex department?

THE WITNESS: Yes, sir, there are.

THE COURT: But there —

THE WITNESS: But they are automatic.

THE COURT: Automatic?

THE WITNESS: They are automatic in the simplex department. That's a fairly highly automated type of equipment, and it is run more automatically with the operators there performing more of an inspection type duty than down in the center of the plant where the sealex operators have to hand load the bulbs on the machines.

THE COURT: So there are sealex operators in the simplex department, but the machines there are automatic as opposed to hand?

THE WITNESS: No, sir, we don't have sealex operators in the simplex department. They're automatically fed onto the sealex machine.

THE COURT: I see. Did I see one of those machines yesterday?

[T. 570] THE WITNESS: Yes, sir. When we walked, first walked out of the lobby-office area, we walked up to a machine and I mentioned, "This is a final inspector's position." And she was sitting at the machine that does the basing in the simplex department.

In the standard link groups, back in the center of the plant, there were people that were taking the lamps and putting bases on them.

THE COURT: Yes.

THE WITNESS: This is done automatically in the simplex area.

And then the machine directly to her left, it was a long machine, as far as from here to Mr. Crutcher, I guess, it has fires all around the side of the machine. That was a sealex machine; and the bulbs were joined to the mount automatically at the left side position on that machine and automatically came through the fires and had the \_\_\_\_ or the bottom of the bulb melted off. And then they were automatically transferred to the exhaust machine and then automatically over to the basing machine.

THE COURT: Well, there would be a person, or would there be a person in the simplex department whose job it is to watch or look over the sealex machine?

THE WITNESS: No, sir. In the simplex department, we have a final inspector. And that was the person that was [T. 571] sitting on that platform as we came directly out of

the office area into the plant. She has the final chance to look at the equipment, or the lamps, as they pass her position. And she inspects them here for visual defects. Okay. Then, down on the extreme left side of the group, we have a mount inspector, and I believe we walked over and observed the mount operation on one of the sig groups. And that is the only two production type jobs that we have in that area.

Then from the final inspector's position on the group, the lamps go up a conveyor and out into the sleeving department area in the warehouse, where we observed the packaging operator sleeving job. And that is the other person that works in the simplex department.

Now, we did have hand bulb loaders at one time, but we have virtually gotten away from those now.

Then we have a utility operator.

THE COURT: Thank you.

Q. (BY MR. CRUTCHER) Mr. Hunnicutt, is there a requirement that utility operators, in order to be qualified or hold that position, be able to do all the jobs?

A. No, sir, that is not a requirement.

Q. Okay. Would a utility operator serving in that job position on occasion be required to operate the sealex machine?

A. I'm sorry, I don't understand exactly what you [T. 572] mean there.

Q. Okay. A utility operator function is to, say, be in a position whereby they can relieve other employees from their particular machine?

A. Right.

Q. And my question is, then in order to be a utility operator, is there a requirement that the utility operator be able to do the other jobs so that if they are called upon they can, in fact, relieve other employees who may be working on a sealex machine or any other type of machine?

A. We don't have an operator on the sealex machine in the simplex department. The utility operator in the simplex department is required to learn the jobs of acting operator, sleeving, a mount inspector and a final inspector. But the sealex operation is automatic in the simplex department and does not require an operator.

Q. Okay. A utility operator in the S-I-G department, have there been occasions where a utility operator in that particular department has been requested to go and work on a sealex machine in another department?

A. Not to my knowledge. I don't know of a case where this has happened. Normally, they work in their own department there in the simplex area.

Q. Can a utility operator in one department be loaned to a foreman in another department?

[T. 573] A. A person can be loaned anywhere in the plant.

Q. Or assigned to any other department under or at the request of another foreman if the regular foreman is in a position to allow that person to go and assist this other foreman?

A. This can be done, yes.

Q. Do you know whether or not during the period of time that Mrs. Vaughn had been disqualified as a sealex operator that she may have on occasion, as a utility operator, worked on a sealex machine outside of the S-I-G department?

A. Not to my knowledge, sir.

Q. But could it have occurred?

A. I don't think so, sir.

Q. On direct, there were some statements made in regards to Defendant's Exhibit 49 A and B, which is a discipline report in regards to Miss Christine Vaughn, is that correct?

A. Yes, sir.

Q. And on that same report, the original date of October 13th, 1977 has been scratched out and the date of June 22, 1978 written in, is that correct?

A. Yes, sir, that's what's shown here.

Q. And on the date of "the offense was continuing, last offense 10-7-77", and that date has, in fact, been scratched out, too, and another date "last happened 6-12-78 and last late 6-9-78" inserted?

[T. 574] A. Yes, sir, it is.

MR. MOORE: Is that the one we put into evidence or is that one that was furnished you before the trial?

MR. CRUTCHER: This is one furnished before trial.

MR. MOORE: All right. Now, there's a difference.

THE COURT: Do it by addressing the Court, Mr. Moore, instead of conversing with counsel.

MR. MOORE: Excuse me, Your Honor. I did not want him to be misled by that. I'm sorry.

THE COURT: You're saying that the exhibit that Mr. Crutcher is using is not the one in evidence?

MR. MOORE: That's correct.

THE COURT: Is that right, Mr. Crutcher?

MR. CRUTCHER: From what I have been informed, Your Honor, I would have to say that it is.

THE COURT: Why don't you get the one that's in evidence and compare them to be sure?

MR. MOORE: May I explain to the Court what the difference is?

THE COURT: Yes, sir, as soon as we determine that there is a difference.

MR. CRUTCHER: Yes, Your Honor, there is a difference in that the one admitted into evidence, being Defendant's Exhibit 49 A, has the date of October 13, 1977 at the top, as opposed to the one that I was referring to had the date [T. 575] of October 13th, 1977 scratched out and June 22, 1978 inserted. So there is a difference in the two reports.

THE COURT: Well, are you going to explore the difference, Mr. Crutcher?

MR. CRUTCHER: Yes, Your Honor.

THE COURT: All right. You may question the witness based on that copy, if you will furnish the Court a file, if you wish.

MR. CRUTCHER: Okay.

Q. (BY MR. CRUTCHER) Okay. In looking at the two reports that we have here, Mr. Hunnicutt, as to the one that



has been admitted, 49 A, what is the description of the offense allegedly committed by Miss Vaughn that warranted the discipline report being made.

A. Absenteeism, sir.

Q. And what date does that say?

A. Which copy of it, sir?

Q. Same as on the line with the description of the offense.

A. I said, which one of the—

Q. 49 A.

A. 49 A. Okay. 49 A was a written disciplinary report that was given Miss Vaughn on October the 13th, 1977 for excessive absenteeism and lateness. The date of the offense shows it's continuing, with the last offense October the 7th, [T. 576] 1977. It said, "Since 4-1979, the employee has been late twenty-two times and absent twenty-nine days on eleven separate occurrences. This does not include a thirty-eight day period spent on the disability role."

Now that as the offense for which the written warning was issued at that time.

Q. Okay. Now, as to the other exhibit that I was referring to, the one that I had been furnished a copy of, the period of time says, "Since October 13, '77, employee has been late twelve times and absent five days."

A. Yes, sir.

Q. Okay. What accounts for the difference between the report I was referring to and the one that has been admitted into evidence as 49 A?

A. The report that you were referring to was a copy of the written warning issued October the 13th, 1977. That was changed and updated to include the information for the written warning issued June the 23rd, 1978. Then the warning was typed from this.

Q. Okay. Which warning, or which copy of the discipline report did Mrs. Vaughn actually receive on June 23, 1978?

A. This copy, sir.

Q. The one that states, "Since October 13, '77, this employee has been late twelve times and absent five days"?

A. Yes, sir.

[T. 577] Q. Okay. Now, prior to the time that Mrs. Vaughn received this discipline report, to your knowledge, do you know whether or not she had received verbal warnings from her supervisor?

A. I believe so, but I would have to review one of these documents again to look in the "remark" section to see what's stated there. The one you have would be sufficient, I believe.

Q. Well, I'll tell you what, let's go back to the one that has been admitted.

A. I'm reading from the "remarks" section of this discipline report, "Employee has been talked with informally on several occasions about her unsatisfactory absentee record. On 6-6-75, she was given a verbal warning in the presence of the shop steward; and on 4-13-76, she received a written warning in the presence of the shop steward for excessive absenteeism and lateness. She was informed at that time that further and more severe disciplinary action would be taken if her record did not show immediate correction."

Q. Okay. Mr. Hunnicutt, there at Westinghouse, do you all have a set definition as to "excessive absenteeism"?

A. No, sir. We don't allow — we don't have any allowed days, sir.

Q. But employees on occasions do miss days?

A. Yes, sir, they do.

[T. 578] Q. All right. Well, then if employees miss days, what number of days can an employee miss within a twelve month period of time that you have instructed your supervisors would be considered excessive absenteeism?

A. Again, we don't have any fixed number that says if a person misses more days than this it's going to be an excessive number of days. There may be a case when an employee is involved in an automobile accident and is out for a period of six to eight weeks. If this is the only time the person had been out for a time, we certainly wouldn't consider this excessive. There might be another time when another employee would be out sporadically a day or two a month over a period of time, that person could be out for a less number of days and yet it would be considered as excessive absenteeism.

Q. But the truth of the matter is that you do not have a set firm policy defining what is excessive absenteeism?

A. No, sir.

Q. Okay. Reading from the same report, in regard to remarks made concerning Mrs. Christine Vaughn, "On 6-6-75, she was given a verbal warning in the presence of the shop steward, and on 4-13-76, she received a written warning in the presence of the shop steward for excessive absenteeism and lateness." From reading the remarks, are you able to determine what number of days she had actually

missed between June 6, '75 and April 13, '76? That's approximately [T. 579] ten months later.

A. No, sir, not from this report. It would be in her previous absence record, but I wouldn't be able to tell it from this particular report.

Q. Okay. Is there a set policy at the plant in regards to lateness?

A. We don't have any allowance for lateness. We need all employees there when the plant starts.

Q. Are all employees always in their position at the designated starting time?

A. No, sir, they're not.

Q. Okay. Let's take, for instance, that you had an employee who was, say, one minute getting into his position for the starting time, would he be considered as being late?

A. Yes, sir.

Q. Is it up to the supervisor to determine whether or not an employee is late if he is, in fact, one minute being in his position?

A. No, sir. It's recorded late on the person's time clock-card.

Q. When that person clocks in?

A. Yes, sir.

Q. Now, when you received letters or notes of criticism from supervisors concerning Mrs. Vaughn, did you notify her upon receipt of those notes of these criticisms and [T. 580] allow her to give an explanation?

A. No, sir. According to the notes I had received, her supervisor had already discussed the matter with her, and that was what was covered in the memo. It was just a memo to me advising me of what had been done.

Q. But yet and still, what the supervisor said was placed in her personnel file?

A. Yes, sir.

Q. Which at a later date in time could be used to discipline the employee if disciplinary actions were warranted, is that correct?

A. The notes that are placed in the person's file, of course, are reviewed at any time action is taken.

Q. Now, before an action is taken, do you allow the employees to look and see what materials may be in their personnel file?

A. Employees, upon making a request, have the right to review their personnel file. I'll set up a time for them to review their file if they so desire.

Q. Do you make such information known to a new employee upon the date of hire?

A. We started this policy in January of this year, and employees had this information mailed to their homes in the form of a notice on a newsletter.

Q. But it was not in effect when Mrs. Vaughn was [T. 581] receiving these notes that were placed in her personnel file?

A. No, it was not.

Q. Turning now to the Defendant's Exhibit Number 50, in regards to the plaintiff here, Marion Gee, I show you a copy of Mrs. Gee's personnel records or job records, and ask you what was Mrs. Gee's initial job assignment?

A. She was hired as a sealex machine operator.

Q. Another grade four?

A. Yes, sir.

Q. Now, was this an automatic sealex?

A. The automatic sealex, sir, doesn't have an operator. It's an all hand operated sealex operation.

Q. So this was hand?

A. Yes, sir.

Q. All right. What was Mrs. Gee's training period on that sealex?

A. Sir, I really can't tell from looking at this what her training period was.

Q. Okay. I call your attention to Defendant's Exhibit in regards to the first step answer to the grievance filed by Mrs. Gee.

A. Yes, sir.

Q. And in looking through this exhibit — well, first, it is an exhibit from or signed by Mr. Maynard, is that correct?

[T. 582] A. That's right, sir.

THE COURT: What's the number of that exhibit, Mr. Crutcher?

MR. CRUTCHER: 51, Your Honor.

THE COURT: Thank you.

THE WITNESS: Sir, this exhibit covers the job of a mount inspector, not a sealex operator.

Q. (BY MR. CRUTCHER) Okay. I was going to get to that, Mr. Hunnicutt.

A. Oh, excuse me.

Q. In thumbing through Mrs. Gee's records, are you able to see when she was placed on the mount inspector coil feeder job?

A. Yes, sir. She was transferred to the job of mount inspector coil feeder on January the 22nd, 1973.

Q. Okay. How long had she worked as a sealex operator from her initial date of hire until the date that she was transferred to the mount inspector coil feeder?

A. She was hired as a sealex machine operator on June the 8th, 1970. On October the 19th, 1970, she was disqualified as a sealex machine operator and transferred to the position of bulb loader hand.

Q. Okay. Now—that's the same document, Mr. Hunnicutt?

A. Yes, sir.

Q. On 10—October, 1970, she was disqualified from [T. 583] sealex machine?

A. Okay. To your knowledge, do you know what training Miss Gee received on that sealex machine before she was disqualified?



A. No, sir, not from what I have here, I sure don't.

Q. Okay. Do the records indicate whether or not she received any rate increase due to production or job performance?

A. Yes, sir, she did.

Q. So she received rate increases while serving as a sealex operator?

A. Yes, sir, she did.

Q. Okay. Now, what was the date of her last pay increase on the sealex prior to being disqualified?

A. August the 24th, 1970.

Q. She came in on June 8, '70?

A. Yes, sir.

Q. And on August the 24th, 1970, she had received a rate increase for her job performance?

A. Yes, sir.

THE COURT: Do you show the rate per hour, Mr. Hunnicutt?

THE WITNESS: Yes, sir. On October the 24th, 1970, she received an increase from Two Dollars and Twenty-Nine Cents an hour to Two Dollars and Thirty-Four Cents an hour.

[T. 584] THE COURT: You mean on August 24, 1970?

THE WITNESS: Yes, sir.

THE COURT: Is that the first raise that she got since her initial hire?

THE WITNESS: No, sir. She was hired on June the 8th, 1970; on I believe it was 8-3-70, she received an increase of from Two Dollars and Twenty Cents an hour to Two, Twenty-Four an hour; on 8-10-70, she received an increase from Two, Twenty-Four an hour to Two, Twenty-Nine an hour; then on 8-24-70, she received an increase of from Two, Twenty-Nine to Two, Thirty-Four an hour.

THE COURT: Thank you.

Q. (BY MR. CRUTCHER) Else—excuse me. Those same pay records that we have been referring to, do they also show when Mrs. Gee changed from one position to a position entitled a mount inspector coil feeder?

A. Yes, sir, they do.

Q. Okay. What date was that, Mr. Hunnicutt?

A. This was on January the 22nd, 1973.

Q. What grade is that mount inspector coil feeder?

A. Grade three.

Q. Okay. Does it—well, do you have an automatic coil feeder and a hand coil feeder?

A. Yes, sir, we do.

Q. Do those records state whether or not she was placed [T. 585] on the automatic coil feeder or the hand coil feeder?

A. No, sir, they do not.

Q. Okay. I'm going to ask you some questions in regards to Defendant's Exhibit Number 57 that refers to Mrs. Gee's job transfer of the mount inspector coil feeder 1-22-73, and it consists of approximately eight pages. And on page 3, there is some history in regards to Mrs. Gee being placed on that job.

Does it state in the fifth paragraph the amount of time that her new supervisor spent in teaching her that job?

A. Yes. It said her supervisor had noted on January the 24th, 1973, that he had spent a total of fifty minutes with the employee going over in detail the procedure to use in starting the machine, said then on 1-25-73, he again reviewed the start-up procedure and other parts of the job, spending thirty minutes with her at this time; then on 1-30-73, her supervisor stated that he had at that time spent approximately four hours instructing the employee and she did not turn on a stem machine in the order that she had been instructed.

Q. Okay. Now, going back from the date that she was placed on this job, effective 1-22-73, it appears that the supervisor had spent approximately four hours and fifty minutes, at the maximum from this record here, of teaching Mrs. Gee the instruction as to how to operate that job, am I correct?

[T. 586] A. That's what's indicated here, sir.

THE COURT: Wouldn't it be five hours and twenty minutes, Mr. Crutcher?

MR. CRUTCHER: Four hours, Your Honor, and then—

THE COURT: Did I get it wrong? I thought it was fifty minutes and then thirty minutes and then four hours?

MR. CRUTCHER: You're correct, Your Honor. On 1-24-73, fifty minutes, and on January 25th, it was thirty minutes, and then on the 30th, it was four hours. So we're talking about a total of five hours and twenty minutes—

THE WITNESS: That's true.

MR. CRUTCHER: —that he had instructed her.

Q. (BY MR. CRUTCHER) And then on October 31 of the same month, the supervisor reviewed her performance, is that correct?

A. That's what's indicated here, sir.

Q. Now, is there a particular training period for an individual to go through when being placed on the inspector coil feeder job?

A. Normally, a person is put with just an experienced employee, an employee who is experienced on the job. And the supervisor rarely spends this time with an employee. This was something out of the ordinary for the supervisor to spend that much individual time with an employee. Usually, he just relies on one of his experienced operators to train a person.

[T. 587] Q. Okay. Well, then if that's the case, would it be safe to say that Mrs. Gee was having some difficulty in learning that machine?

A. Yes, sir, I believe so.

Q. Okay. But yet and still, on October 31, the supervisor reviewed her performance and told her that her progress was not satisfactory. Do you know whether or not this supervisor, after reviewing her performance on January 31, spent any more time himself trying to train Mrs. Gee on that machine?

A. I would have to review those notes further to see if there are any other indications of that, sir.

It indicates here that the supervisor reviewed the steps with the employee that he was going to take to help her improve her job performance and told her at this time that if she didn't follow the instructions and improve her performance, disqualification would result. Now, as to what the supervisor told her at this time was going to be done, I don't know from the notes that I have here.

Q. Okay. In the same exhibit that we have referred to, is there also some description as to the full range of the job that Mrs. Vaughn was occupying at the time?

THE COURT: You mean Mrs. Gee?

MR. CRUTCHER: I'm sorry, Your Honor, Mrs. Gee.

THE WITNESS: Yes, sir. He indicated in this note [T. 588] that she had showed some improvement but was not able to perform the full range of her job. And he's listed loading coils, leads, exhaust tubing, changing unhangng flares. This were items that he did include here.

Q. Okay. Now, these particular functions, would that be on the automatic or manual machine?

A. With the exception of, well, loading the coils; the coils are hand loaded with tweezers into the hand loading machine, and on the automatic they're loaded in buckets and cones, so to speak, and then placed in position to be picked up. So by his just referring to loading coils, I'm not sure whether he means the hand feeding of the coils or whether he's referring to both the hand feeding and loading the coils and the buckets on the automatic.

Q. Well, would the records indicate whether or not she was on a manual or automatic at the time?

A. The payroll records wouldn't. There might be something in this grievance material that does indicate that.

Q. Okay. To your knowledge, do you know whether or not Mrs. Gee first started out on the automatic machine?

A. No, sir, I'm not sure which one she started on. I know she worked on both machines, but whether she started on the automatic and then went to the other or switched back and forth. I'm not sure without reviewing some other notes on the grievance which way this went.

[T. 589] Q. But it is safe to say, is it not, Mr. Hunnicutt, that if a person begins on an automatic there would sometimes be required some additional training on the manual?

A. Yes, sir.

Q. Okay. Is there a specific training period for the automatic?

A. No, sir.

Q. Is there a specific training period on the manual?

A. No, sir.

Q. Okay. After Mrs. — well, before Mrs. Gee was disqualified from this inspector coil feeder, was she, to your knowledge, given an opportunity to get additional training from her supervisor, other than the five hours and twenty minutes that we have spoken about earlier?

A. I'm not sure whether the supervisor gave her any additional personal training or whether he just provided additional training by an experienced operator to be with her while she was performing her job.

Q. Okay. Once Mrs. Gee became disqualified, do you know whether or not she filed a grievance with the management in regards to her being disqualified?

A. Yes, sir, she did.

Q. Do you know the results of that grievance?

A. Yes, sir.

Q. What was the results?

[T. 590] A. It was turned down at the first level, appealed to the second level; it was turned down at that level and it was appealed to the division level and was heard by the division manager of personnel relations, and it was also turned down at that level.

Q. Okay. The Defendant's Exhibit 59 refers to the decision in regards to Mrs. Gee's grievance from Bloomfield, that was addressed to Mr. Bloomfield, is that correct?

A. Addressed to Mr. J.K. Kelleher in Bloomfield, New Jersey.

Q. Okay. In this report, reading from the front page, Mr. Lindsey has stated, "Although this record shows shrinkage by a group on a daily basis, there is no way to determine that high shrinkage on a particular day was attributable to the operator's performance. The record does indicate, however, a ninety-three percent increase in shrinkage on the group to which she was last assigned when the fourteen days while she was on the group are compared with the fourteen operated days prior to that, and conversely, there was a ten percent decrease in shrinkage on the group from which she was transferred when fifteen days of operation after her transfer are compared with the seventeen days that she was on the group."



There were some good and bad days in all four periods, is that correct?

A. Yes, sir, that's what's indicated here.

[T. 591] Q. Now, from what he's saying, was he able to determine that Mrs. Gee herself was the cause of the increase in the shrinkage?

A. He was not able to determine from the records what percent of the shrinkage increase was attributable to operator error or operator problems.

Q. Okay. Do you all make any allowance for a percentage of shrinkage there at the plant?

A. I don't know what you mean by "make an allowance for it", sir.

Q. Well, let me ask you this, Mr. Hunnicutt, does shrinkage occur?

A. Yes, sir.

Q. All right. Now, if shrinkage occurs, is there any allowance for the shrinkage?

A. I still don't know what you mean by "is there an allowance for the shrinkage." In what means is there an allowance?

Q. Well, Mrs. Gee stated that she had been disqualified for her shrinkage from the information—

A. Yes, sir.

Q. —that her former supervisor apprised her of.

A. Yes, sir.

Q. Do other employees have shrinkage?

A. Yes, sir.

[T. 592] Q. Okay. Then what is the percentage or amount of shrinkage can an employee have on a job before they're disqualified from that job?

A. I can answer it this way, Miss Gee's disqualification was based on primarily her supervisor's records—

Q. What records?

A. Records that he had, the notes that he had and the time he had spent with Miss Gee, the help that he had put with her. And Mr. Kelleher just asked us to try to furnish some figures on this to see if there was a correlation in the levels of shrinkage on the days she was on group—on a group with the reports that had been turned in by Mr. Maynard as to problems he was having with Mrs. Gee.

Q. Well, even the letter by Mr. Lindsey states that there is no way to determine that high shrinkage on a particular job was attributable to the operator's performance, is that correct?

A. That is what he said.

Q. So even though you used the days that Mrs. Gee was on that job and from the records that were available he was not able to pinpoint that the high shrinkage could be traced directly to Mrs. Gee, is that correct?

A. He could not pinpoint that the shrinkage was caused entirely by Mrs. Gee or by some part on the machine.

Q. Mr. Hunnicutt, turning to the termination of Mrs. [T. 593] Gee, before Mrs. Gee was terminated, did she request any time off from you?

A. Sir, I don't remember it if she did.

Q. Okay. You stated on direct that Mrs. Gee, or it came to your attention that at some point in time Mrs. Gee had fired her pistol five times. To your knowledge, do you know whether or not Mrs. Gee fired her pistol at any point in time there at Westinghouse?

A. This was not meant to be at Westinghouse. Mrs. Gee just relayed this to me in our conversation that she had done this. It was not done at Westinghouse. She didn't indicate she had done it at Westinghouse.

Q. Okay. On the date that Mrs. Gee was terminated, was she scheduled to appear at work that day?

A. She was scheduled to appear at work that day, but she had called in and said she did not intend to come to work.

Q. And she wanted to be off, is that correct?

A. That's correct.

Q. And you requested her to come on?

A. I asked that she come by and see me.

Q. And she did?

A. She did.

Q. Okay. Were there any other options available from management in regards to Mrs. Gee other than termination?

A. Sir, at that time, we did not see any other options.

[T. 594] Q. Have other employees there at Westinghouse fired pistols on Westinghouse property?

A. Yes, sir.

Q. Are any of those employees still employed by Westinghouse?

A. Not to my knowledge, sir. There's only one that I'm aware of that actually did. And she was terminated.

Q. Do you know a person by the name of Peggy Thompson?

A. Yes, sir.

Q. Is she not an employee of Westinghouse?

A. Yes, sir.

Q. Did she fire a pistol?

A. No, sir.

Q. Was she involved in a pistol?

A. Yes, sir.

Q. Well, do you know the name of the other party that was involved with the pistol?

A. Yes, sir.

Q. What was that person's name?

A. Miss Dorothy Frierson.

Q. Okay. When this incident occurred, was Mrs. Thompson suspended for a period of time?

A. Yes, sir, she was.

Q. And she did not fire the pistol?

A. No, sir.

[T. 595] Q. And then Mrs. — and she was able to come back to work, Mrs. Thompson?

A. A grievance was filed; it went to arbitration; the arbitrator ordered Mrs. Thompson reinstated to her job.

Q. Was this here before or after Mrs. Gee's termination?

A. I believe that the order from the arbitrator was received after Mrs. Gee's termination. I'm not sure; I don't remember the exact date on it.

Q. Okay. Before terminating Mrs. Gee, did you give her an opportunity to resign or take a leave without pay?

A. No, sir.

Q. Okay. Moving to another party plaintiff here, Mrs. Crutcher, I hand you what has been marked Defendant's Exhibit 6, and ask you whether or not those records would indicate the particular job that Mrs. Crutcher occupied upon her initial hire?

A. Yes, sir, it does.

Q. Okay, what position was that?

A. She was initially hired as a sealex machine operator.

Q. Grade four?

A. Yes, sir.

Q. Okay. Do you know what training Mrs. Crutcher received in regards to the sealex operator's job?

A. No, sir. I'm not able to tell that from this. She did get increases.

[T. 596] Q. Okay. What dates do the records reflect that she received her first increase?

A. She received an increase on May the 29th, 1972, in the amount of from Two Sixty-Three an hour to Two Sixty-Seven an hour.

Q. And how long did she remain in that sealex position?

A. She remained as a sealex operator from the time she was hired on May the 1st, 1972 until she transferred by her own request to the job of mount inspector coil feeder on June the 4th, 1973.

Q. Okay. Now, her initial date of hire was May 1, '72?

A. That's right, sir.

Q. Now, shortly thereafter Mrs. Crutcher's initial date of hire, did you receive a note from her supervisor criticizing her job performance dated May 8th, '72?

A. I would have to review the notes to be sure, sir. There was one somewhere in there, but I'm not sure.

Q. Well, I'll show you a note, and ask you whether or not you can identify it?

A. Yes, sir. This is a note I received from her supervisor.

Q. And who was that supervisor?

A. Mr. Roger Maynard.

Q. And what's the date on that note?

A. May the 8th, 1972.

[T. 597] Q. Now, in that note in which Mr. Maynard criticized Mrs. Crutcher's job performance, does he state in there anywhere the amount of training, if any, he gave Mrs. Crutcher?

A. No, sir. No, sir, he does not indicate in this what training he had given her.

Q. Okay. Now —

THE COURT: Excuse me, Mr. Crutcher. But did you say May 8, 1972, Mr. Hunnicutt?

THE WITNESS: Yes, sir, that's the date that's on this form.

THE COURT: She had been employed at that time one week?

THE WITNESS: Yes, sir.

THE COURT: And that was her first day with Mr. Maynard?

THE WITNESS: I'm not sure. It may very well be, sir. It looks like he signed —

THE COURT: Well the stipulation so states.



THE WITNESS: Okay. Maybe it was then.

THE COURT: Is that right, Mr. Moore?

MR. MOORE: She was employed when? I'm sorry, Your Honor.

THE COURT: She was employed on May 1, 1972, and changed from Mr. Turnage to Mr. Maynard on May 8th. That's what the stipulation says. I just want to make sure that's [T. 598] correct.

MR. MOORE: She was employed on May 1, 1972. You are referring to employee Glenda Crutcher?

THE COURT: Yes, sir.

MR. MOORE: All right, sir.

THE COURT: It's not necessary to pursue it. I'm assuming the stipulation is correct.

MR. MOORE: That's correct, Your Honor.

MR. CRUTCHER: Your Honor, I've been informed that my client didn't ever work for Mr. Turnage. She worked under Mr. Maynard, if I'm correct. So that stipulation is incorrect as to working under Mr. Turnage.

THE COURT: Well, we'd better have some evidence in the record if the stipulation is going to be contradicted.

In any case, Mr. Maynard did write a note on May 8 criticizing her performance?

THE WITNESS: Yes, sir, he did.

THE COURT: That's where we left off, Mr. Crutcher.

MR. CRUTCHER: Yes, Your Honor.

Q. (BY MR. CRUTCHER) Now, Mr. Hunnicutt, once you received that letter on May 8, '72 did you inform the employee, Mrs. Crutcher, that you had received a criticism from her supervisor as to her job performance in one week's time?

A. No, sir. Mr. Maynard had had a discussion with [T. 599] Mrs. Crutcher. He just sent a memo advising us that the discussion had been held.

Q. Do you know for a fact that he had a discussion with her?

A. No, sir. All I know is what I read in the note that Mr. Maynard sent me.

Q. Okay. Do you know what training Mr. Maynard had given Mrs. Crutcher during this one week period of time?

A. No, sir, I do not.

Q. Okay. Did Mrs.—excuse me—Mrs. Crutcher, subsequent to the note from Mr. Maynard, go to another supervisor on the sealex machine?

A. May I trace her record through here?

Q. Sure.

A. Will that be satisfactory? Okay, according to her record here, Mr. Turnage signed for this employee, signed her records for her on May the 1st, '72, when she was hired. On May the 8th, '72, Mr. Maynard signed that she transferred to him with a change in foremen.

Q. Okay. What date did she transfer then, to your knowledge from what the records indicate, from Turnage to Maynard?

A. May the 8th, sir, is the date shown here.

Q. Okay. Now, going back to May 1, '72, could Mr. Turnage have signed that and Mrs. Crutcher not have been under [T. 600] his employment?

A. Yes, sir, he could have signed this and she could have gone directly to work for Mr. Maynard. It's possible. They both worked on the same shift at that time, as I remember.

Q. So she may have had two different supervisors or what?

A. Well, according to the records, she had Mr. Turnage when she was initially hired and she had a change in foremen on this date. Now, this may have been done just to correct our records to reflect which supervisor she actually worked for. This is all I can tell just by looking at the records here.

Q. Okay. What date from your records indicate that she was placed under Mr. Maynard?

A. May the 8th, 1972.

Q. And on that same date you got a letter from Mr. Maynard criticizing Mrs. Crutcher's job performance?

A. Yes, sir.

Q. So then with your own records, it appears that she may have only been up under him one day as an employee and he sent you the letter of criticism?

A. Yes, sir. His primary criticism, I believe, was Mrs. Crutcher sitting on a stool or a bench while the other employees in the group cleaned up.

[T. 601] Q. Do you know whether or not he or any other supervisor had told Mrs. Crutcher of what the general job duties were?

A. No, sir, I'm not. First hand knowledge, I don't know what she was told.

Q. So it could be possible that she may not have been instructed that on occasion you may have to sweep, or whatever, in one week's period of time?

A. I don't know what she was told, sir. I couldn't answer that.

Q. Did Mr. Maynard's notes state that he had told her prior to May 8th, '72, that she may have to sweep?

A. Did he what, sir?

Q. Did Mr. Maynard's notes dated 5-8-72 state that he had instructed Mrs. Crutcher that she may would have to sweep the floor?

A. No, sir. His note just advised that he had had a discussion with her on May the 8th.

Q. So that may have been when he informed her that she may have to sweep the floor, is that correct?

A. I don't know, sir.

Q. Okay. From looking at the records that we have there, do they indicate when Mrs. Crutcher reached top pay as a sealex operator?

A. Yes, sir. She was given an increase to top pay on September the 26, '72, retroactive back to August the 7th, [T. 602] 1972.

Q. Okay. What would call for a retroactive back pay to top pay?

A. I can't tell from this. I can only speculate that someone in my office failed to send a—prepare a payroll authorization change and send it to her supervisor for his signature.

Q. Okay. Other than the letter that I have shown you dated 5-8-72, prepared by Mr. Roger Maynard, did you receive any other written complaints in regards to Mrs. Crutcher's job performance or conduct from her supervisors between 5-8-72 and February 7th, '75?

A. Yes, sir, I did.

Q. Okay. When you received these letters, did you communicate to Mrs. Crutcher that you had received letters of criticism from her supervisors?

A. I did not go to Mrs. Crutcher upon receipt of a note from her supervisor and advise her that I had received this note. On occasion, Mrs. Crutcher was present in my office for discussions after these notes were received when the occasion that prompted the preparation of the note was discussed.

Q. Okay.

THE COURT: Mr. Crutcher, let me ask a question. This is a little bit out of order. I'm sorry to interrupt [T. 603] you, but I just thought of something.

When we're talking about an employee being disqualified and Mrs. Crutcher was not disqualified, as I read the stipulation here, that wasn't one of the things that happened to her. But the other two were at one time or another. One of the reasons for being disqualified would be not making enough production, wouldn't it?

THE WITNESS: Yes, sir, that would be a reason.

THE COURT: I mean, if you couldn't pack enough bulbs in a certain period of time or something of that type?

THE WITNESS: Yes, sir, that would be one of the reasons.

THE COURT: Is that a matter of the supervisor's judgment, primarily, or are there numerical standards of production that have been set up?

THE WITNESS: There have been numerical standards set by the company in that a machine is capable of so much production; it indexes at a certain number of times per hour. And on one of these hand operations, if every position was filled, then after a period of an hour then X number of units would be possible. And there was something less than this. And I don't remember the exact numbers on this, but it was considered that this is a fair number that a person can get. And they've had industrial engineering studies on this in years past. And I don't really remember the numbers, [T. 604] exactly, but they do have some basis for this numerical study.

THE COURT: So there was, during the periods of time we're dealing here, numerical production standards? Of course, you new how fast a machine would go and then I suppose there was some allowance underneath that?

THE WITNESS: Yes, sir.

THE COURT: Were those standards communicated to the employees?

THE WITNESS: We don't have anything like an incentive plan. Ours is just strictly straight day work. And what we communicate to the employee is that we expect a person to perform seven and a half hours work at a normal

level. But still the normal level means a certain range here, and if a person is not hitting this, then the supervisor communicates with them where they're having the problem; if they're missing heads or if they're having excessive shrinkage, he tries to work with them directly on the problem that's causing them to miss this, rather than saying, "Look, you've got to get X number of units off this group." He tries to work with them on the problem that is causing this, rather than just holding this number up and saying, "You've got to get this number."

We try to stay away from that as much as possible and work on correcting the problem, rather than just advising a person that they're twenty units a day short or something [T. 605] from what we expect.

THE COURT: But a supervisor would have that knowledge in his own mind, I suppose; he would know how many units short, approximately?

THE WITNESS: Yes, sir, he would.

THE COURT: He would know how many units short an operator was?

THE WITNESS: Yes, sir, he would.

THE COURT: But you're saying that as a general matter he did not go to her and advise her that she was so many units short, he would simply work with her on correcting whatever her particular problem was?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q. (BY MR. CRUTCHER) Mr. Hunnicutt, as to production, are there periods of time when your output is higher than at some other time when it might be at a lower pace?



A. By our "output", do you mean —

Q. In terms of production, you had made mention to machine counts or whatever. And I'm saying, can you set that machine to where you can increase the number of items that you want on a particular day and then at the same time scale it back down and have another particular number that you wanted on a different day?

A. No, sir. Our machines run at the fixed number all [T. 606] of the time. If we increase or decrease production, our options are either to take an equipment out — a piece of equipment out of production or to operate a piece of equipment on Saturday or to add an additional crew of people to operate a piece of equipment perhaps on a third shift that's not operating at the present time.

Now, they do strive to find ways, of course, to increase the output from a given piece of equipment, but when this is done and there is a change in the rate of speed on a piece of equipment, we are required to notify our local union of this in advance of changing this speed and then put it into effect. We don't change speeds one day to the other on something like this.

Q. Okay. On your bulb wash machine, at the rate of speed that the racks were coming around when we visited the plant, was the speed, or has the speed in the past been increased?

A. Not to my knowledge, sir. As far as I know, that's the speed that it always operates.

Q. To your knowledge?

A. Yes, sir.

Q. But it could have been on occasion?

A. I don't know. I said, that's the only speed I know anything about, sir.

Q. Okay. On that day you had two ladies working there?

[T. 607] A. Yes, sir, one loading and one unloading.

Q. Mr. Hunnicutt, on 3-6-75, you received a note from a person signed "Carl" in regards to Mrs. Crutcher's conduct, is that correct?

A. No. This really doesn't refer to her conduct, as such; this is advising me that Mrs. Crutcher had left at 6:30 one evening and that her time card wasn't clocked out, but her under time pass was. So they figured she had just forgotten to clock out. But when he checked the timecard racks at 11:15, her card had been clocked out at 11:00 o'clock. And, as I remember, this was sent to me so I could check the payroll department and see that she was paid until 6:30 and not until 11:00 o'clock.

Q. But now her under timecard shows 6:30?

A. Yes, sir.

Q. And when you would get an under timecard, would you not correlate that card with the work-week timecard?

A. Yes, sir.

Q. All right. Now, when you received this note from Carl, did you bring this to Mrs. Crutcher's attention?

A. No. This was brought to the attention of payroll department so that this could be taken care of. I didn't see any reason to say anything to Mrs. Crutcher about this. Apparently, someone clocked her card out in error when they left the plant.

[T. 608] Q. But, why did you not take it out of her personnel file once the payroll for that period of time was straightened out?

A. There could have been a question sometime later on about the pay for that particular period and the reason something like this was done. And if that was the case, we would still want a note here so we would know what had happened.

Q. Okay. This note is dated 3-6-75, am I correct?

A. Yes, sir.

Q. And Mrs. Crutcher has received this pay sometime after 3-6-75?

A. Yes, sir.

Q. But, yet and still, this note is still in her personnel file?

A. Yes, sir.

Q. Has Mrs. Crutcher come to you concerning any disparity in her pay check since 3-6-75?

A. Not to my knowledge, sir.

Q. Did you ask Mrs. Crutcher as to whether or not she had any knowledge as to her time clock being clocked out at 11:00?

A. I don't believe I did, sir. She had left at 6:30 that evening and someone else had clocked her card out when they left the plant.

Q. I hand you what has been marked as Defendant's [T. 609] Exhibit 18. It's dated 4-29-75, and it appears to be a

letter to Mrs. Crutcher's file from her supervisor at the time. Now, when you received that note from her supervisor, did you inform Mrs. Crutcher that you had received such?

A. Mrs. Crutcher came in the next afternoon and we had a meeting in which this was discussed.

Q. Okay. And what did your conversation —

A. I believe there are some notes on this conversation that were introduced. But I would like to review them, rather than to try to talk from memory.

Q. Okay. I will show you then the Defendant's Exhibit Number 19, and it refers to the conversation, is that correct?

A. Yes, sir, I believe this is the conversation.

Q. Okay. What explanation did Mrs. Crutcher have with regards to that note being placed in there on April 29, '75?

A. Her supervisor, Mr. Menyhart, had stated, and again I'm reading from the notes here, that Mrs. Crutcher went to a re-inspection table. And he asked her if she had run out of work, and she said no. He said he told her to get with it. And he said that she told me to get off her back. "I told her to do what everybody else did and I would not have to get on her." Then Mrs. Crutcher said, "For one thing, I did not tell him he don't tell me what to do. He said I was over there visiting. I went to get a clamp. The next thing happened when I was relieved. He came over there and told me [T. 610] to put on my glasses. I said, 'Lord, have mercy'; he was standing there looking at me like I was crazy. He talked to me like I was a nut. I was telling Pat Lane what happened and Buster Loveday. I told him I was not going to

clock out so he clocked me out. Two minutes until 11:00, he told me to clock out; I would not clock out."

At that time, I reviewed Mrs. Crutcher's record with her.

Q. Did that contain the various notes that you had received from 5-8-72?

A. From different supervisors prior to this.

Q. Okay. That you had not notified her about prior to you reviewing her complete file, is that correct?

A. I did not notify her that the notes had been received. These notes were sent to us as a memo to the file.

Q. But yet, Mr. Hunnicutt, you used the notes that had been sent to you in reviewing her file and making a judgment when you had not given her an opportunity prior to this date to refute the statements in the notes, is that correct?

A. We reviewed the substance in the notes, the information that was contained in the notes, in referring to incidents that had happened previously with Mrs. Crutcher. Mr. Menyhart had suspended her the night before. And after a discussion with Mrs. Crutcher that day in reviewing her file and explaining to her what was expected, explaining to her [T. 611] that her supervisor had the right to tell her what was expected of her and she was supposed to do it as long as it didn't cause her some bodily injury or harm, reviewed that she was expected to do this and that she was going to have to cooperate with people. Then I changed the suspension to a written warning and asked her to go on back to work and that they'd give her a written warning. But I changed Mr. Menyhart's suspension at that time and brought Mrs. Crutcher back to work without any time off.

Q. Did Mr. Menyhart have the authority to suspend employees?

A. Yes, sir.

Q. Prior to suspending employees, are employees given an opportunity to confer with their union representative?

A. An employee can be suspended without a union representative for a serious infraction of company rules.

Q. What is a "serious infraction"?

A. A serious infraction can be insubordination; it can be fighting; it can be drinking on the premises. But, as I remember, Mrs. Crutcher was not suspended without benefit of her shop steward.

Q. Okay. I hand you another note to the file, Defendant's Exhibit 22, and ask you, when you received that note from her supervisor at the time, did you inform Mrs. Crutcher of that note?

[T. 612] A. No, sir, I did not.

Q. Okay. In that note, Mr. Menyhart—

THE COURT: Mr. Crutcher, excuse me for interrupting you, but I think we are at a good time to take a recess here.

Before we do, let me say, and I mean this not only to you, Mr. Crutcher, but also to Mr. Moore, there has been a great deal of repetition in the trial on both sides. And we have erred, if at all, on the side of thoroughness, which is good; it's better to hear too much than too little. But there is a happy medium there somewhere, and I would just urge each of you to use your best efforts to be as expeditious as possible, without surrendering any substantial right.

Mr. Marshal, we'll be in recess for fifteen minutes.

COURT CRIER: All rise. Court is in recess.

(COURT RECESSED 3:07 - 3:28 p.m.)

COURT CRIER: Everyone rise. United States District Court is again in session. Be seated, please.

THE COURT: You may proceed, Mr. Crutcher.

MR. CRUTCHER: Thank you, Your Honor.

Q. (BY MR. CRUTCHER) Mr. Hunnicutt, let's move towards the employee Constance McClure and some other truck accidents. Do you recall a truck accident involving David Jackson?

A. Do you have anything more specific than that, sir?

Q. Well, on yesterday you were speaking about other [T. 613] individuals or other employees of Westinghouse who were involved in automobile—not automobile, but industrial accidents while operating their trucks.

A. Yes, sir.

Q. And you made mention of several individuals' names who had been disciplined who were white male.

That's right, sir.

Q. And I was asking you whether or not you recall the truck accident involving a driver by the name of David Jackson?

A. Was this involving another employee, sir?

Q. No. I believe he struck a portion of the plant there.



A. As I remember, Mr. Jackson was given a three day disciplinary suspension for striking the electrical box or column or something some few months ago.

Q. Okay. But he was not disqualified from the job?

A. No, sir, he wasn't.

Q. Do you recall a truck accident involving another driver by the name of Earl, who was white?

A. No, sir, I don't.

Q. He struck another portion of the plant.

A. I don't know who that is, sir.

Q. Okay. Do you recall from your memory any other truck accidents involving other employees where they were not disqualified from the truck driver's job?

[T. 614] A. Yes, sir. I remember one employee not too long ago who struck a, oh, it was a fixture out near the aisle in the plant on our second shift with a truck and knocked it loose. He wasn't disqualified. In fact, we didn't even give him any kind of disciplinary action for it.

Q. Okay. Well, do you know why Mrs. Donley — excuse me, not Mrs. Donley, but Mrs. McClure was disqualified from her job when she had an accident?

A. Mrs. McClure was disqualified because of the unsafe operation of her truck. She was subsequently allowed to return to the job.

Q. Well, with this other male that we were speaking earlier about, when he struck a portion of the building, would that not be considered as unsafe or carelessness?

A. When this man that we were talking about, who was a black male truck driver, by the way, when he did this, our investigations indicated that another employee had stepped out from between two pieces of equipment directly in front of him and he had the option to strike the other employee or strike the piece of equipment.

Q. But Mrs. McClure, she denied striking this employee and she had a witness that denied her striking this employee, but yet she was disqualified, am I correct?

A. I don't know, sir. I don't have the records from this before me, and I am not sure just what her conversation [T. 615] was pertaining to this.

Q. Okay. When an employee is loaned or assigned from a job and placed in another job for at least four hours and it's a higher paying job, who attaches the white sheet to the back of the timecard? I'm referring to Defendant's Exhibit 69, and you will see some timecards of W.F. Donley with a white sheet attached on the back.

A. The white sheets are attached to the timecards by the payroll clerk in the accounting department.

Q. So the employee has nothing to do attaching those time sheets in back?

A. No, sir.

Q. Okay. During the period of time when Mrs. Donley was working as a bulb loader in March—excuse me, as a bulb loader hand in June 21, '76 up until 3-4-77, do you know whether or not there were any vacant jobs as final inspector?

A. Vacant jobs?

Q. Yes, sir.

A. What do you mean "vacant jobs", sir?

Q. Vacant job in the position of a final inspector?

A. No, sir, I don't without having benefit of being able to check the record of job requisitions during that period of time.

Q. Okay. I believe on yesterday you testified on direct that if Mrs. Donley had wished to receive the job [T. 616] as a final inspector during the time that she was working back there and when she got the pay of the final inspector as opposed to the pay of the bulb loader hand, then she could have bidden on that job, is that correct?

A. No, sir. I believe that was the sleeving machine operator that I testified to yesterday. And there were two vacancies there after she became eligible to upgrade from the job of bulb loader hand. But this was a sleeving machine operator, rather than final inspector, I believe.

Q. Okay. Is the final inspector job in the same area as the sleeving job?

A. It's in the same department, sir.

Q. In looking at Mrs. Donley's payroll records, she transferred to the disability roll on or about July 14, '78, is that correct?

A. That is correct, sir.

Q. And on or about August 21, 1978, she, from the notation, transferred to the active roll from disability, is that correct?

A. That is correct, sir.

Q. And on August 28th, 1978, there's a notation that Mrs. Donley was discharged for continued unsatisfactory overall attendance record, is that correct?

A. That's correct, sir.

Q. Is there not also a notation on the exhibit [T. 617] dated 8-28-78 that Mrs. Donley received vacation pay for 8-22, 23, 24, 25 and 28, is that correct?

A. Yes, sir, that notation is here.

Q. Okay. Now, when Mrs. Donley was given her notice or termination, did you give her an opportunity to explain her illness and the reason why she needed some additional days to be off?

A. No, sir. When a decision was made to suspend and terminate Mrs. Donley, her attendance record and the actions that had been taken previously to correct this absence problem were reviewed. And it was felt at that point that we had not been successful in correcting this absence problem, and we felt that we had gone to the point where suspension and termination was warranted.

Q. Okay, Was not Mrs. Donley a good worker in terms of job performance?

A. I don't believe I know of any incidents where there were problems, any problems to speak of, with Mrs. Donley's actual performance when she was at work.

Q. Had not Mrs. Donley returned to work or because on the active roll from disability on the 21st of August, '78, and requested her vacation to run from the 22nd through the 28th because of continued illness?

A. I'm not sure about this. When a person is terminated, they're paid for any vacation they have coming at that time. [T. 618] And I am not sure about any requests that she made —

Q. Okay.

A. — in that regard.

Q. Well, her date of discharge was 8-31 — excuse me, was 8-28-78, and on the same records that I have shown you, it states on there that she received her vacation pay for 8-22 through 8-28, is that correct?

A. That's what it shows on the form, sir.

Q. Okay. Do you recall the circumstances surrounding Mrs. Georgia Johnson's termination? And, refreshing your memory, this was the lady who had come to you in regards she had been hired in as a sealex operator.

A. Yes, sir.

Q. And she worked on the job one day and her eyes, from what she had said, began to give her some trouble, and she called in. Did she call in and speak with you?

A. I don't remember who she spoke with, sir.

Q. Do you recall her coming to the plant and getting a slip to go to the company physician.

A. As I remember, she came to the plant and we sent her to the company physician because she claimed that she had an eye problem resulting from working on the sealex machine.

Q. Did she say that her eyes were buring her?

A. I don't remember the exact words she used, sir, but she did have some problem indicated with her eyes.

[T. 619] Q. Okay. The doctor that you sent her to, is he an optometrist?

A. No, sir, he's not an optometrist.

Q. Is he trained and skilled in the treatment of an individual's eye?

A. Sir, he was our plant physician. We sent injury cases or alleged injury cases to him and left it up to his discretion about whether he treated the case or to whether he referred it to someone with a particular speciality.

Q. Okay. When you sent Mrs. Johnson to the doctor and she saw the doctor and the doctor gave her a slip and she came back to the plant, did she make any statement to you that her eyes were still bothering her?

A. Yes, she did, as nearly as I can remember.

Q. And did she ask you or tell you at that time that she wanted to take off because of her eyes?

A. As I remember, she told me she was not going to work.

Q. Because of her eyes?

A. She said, "I'm not going — ", something to the effect that I'm not going to work.

Q. Okay. And shortly after that day, did you, in fact, terminate her?

A. Yes, sir, we did.

Q. Okay. Are you trained as a physician?

[T. 620] A. No, sir.

Q. Are you trained as a medical doctor?

A. No, sir.

Q. Well, why is it, Mr. Hunnicutt, that you do not accept her explanation that her eyes were still bothering her?

A. Sir, that's the reason I sent her to our plant physician, who was a medical doctor, and relied on his recommendations and judgment in handling the case.

Q. Okay. Earlier, you stated that some employees of Westinghouse was having some difficulties with Mr. Brazil, they were not seeing eye to eye as to some things, and you stated that Mr. Brazil was later, as a result of these people coming to you, placed in another position, is that correct?

A. No, sir, I didn't state that.

Q. Well, when was he placed in a position other than the original position of being a foreman?

A. I'm not sure of the exact dates. Mr. Brazil has been in two positions since he initially became a manufacturing supervisor. He was promoted to the position of master mechanic, again I'm not sure of the date, maybe in '73, late '73 or early '74. I'm not really sure of the dates.

Then his latest assignment is that of a general foreman or general manufacturing supervisor. And he has been in that position since, I believe it was about February or [T. 621] March of '76.

Q. Okay. Prior to Mr. Brazil going to this position, did you inform your production workers of this position?

A. Inform our — I don't understand what you mean?

Q. Did you make any job announcement to your production employees that this position that Mr. Brazil was placed in was vacant?



A. The position Mr. Brazil holds now was not vacant at that time. There was just a reassignment of personnel; and he and another person changed positions.

Q. Okay. You stated on direct that it had come to your attention that Mr. Brazil was having some difficulty with his co-workers, and as a result of those difficulties, you placed him in another position.

A. I don't believe I stated that, sir. That's not the way I remember it.

Q. Well, had any employees come to you in regards to their difficulties with Mr. Brazil before Mr. Brazil was placed in his present position?

A. Yes, sir.

Q. Okay. Did you not state yesterday that when those employees came to you in regards to Mr. Brazil's not necessarily inability to get along with these workers, but due to the friction, you placed him in another position and made statements to him how to deal with people?

[T. 622] A. No, sir. I said that I had conversations with him about complaints that people had made and we recounted conversation he had had with people. I asked him what he said; I offered suggestions about how he might handle a situation. But I did not say that I had him reassigned to another position because of this. I believe I stated that he had since been reassigned to other positions, but it had nothing to do with this.

Q. Okay. But you did bring that to Mr. Brazil's attention?

A. Yes, sir.

Q. Okay. When you get criticisms in regards to production workers, do you take it upon yourself to bring those criticisms to the production workers' attention?

A. No, sir, I usually don't do this.

Q. Okay. Mr. Hunnicutt, what, or describe for me your job duty in regards to the company's, that is Westinghouse, affirmative action program.

A. What my duties are?

Q. Yes, sir.

A. I am the coordinator, plant coordinator for this. It's my responsibility to develop the Equal Opportunity or the affirmative action program; I'm the Equal Opportunity coordinator.

Q. Okay. What materials do you use in developing the [T. 623] company's affirmative action program?

A. What materials?

Q. Yes, sir.

A. We use the Federal Register pertaining to affirmative actions plans for contractors; I use material that I get from our corporate headquarters; I use material that I get from the Employment Security Division; I believe we get something from the National Manpower Planning Agencies; we use statistics that we have in our local plant; we have used statistics on employment, applications, terminations, promotions, lateral moves, downgrades, training programs, job make-up within individual work units in our program; we address what we said in the prior year were problem areas; if there were problem areas, what these were addressed; we had set goals for what we were going to do in that year; then we review these in the next affirmative ac-

tion plan, as far as progress that has been made against goals established earlier; and basically that's the type of thing. We have information on internal dissemination, external dissemination, just according to the Federal Register, the areas that are covered in preparation of an affirmative action plan.

Q. Okay. In your formulation of our affirmative action program, have you had an occasion to see what is termed Table 46 of the SMSA?

A. No, sir, I don't believe I have seen this previously.

[T. 624] Q. Do you know what it is or what it reflects, Mr. Hunnicutt?

A. Well, really, this is the first time I'd seen this particular table.

Q. Okay. Table 46, "The Educational Attainment and Labor Force Characteristics by Race, 1970 and 1960", and in formulating your affirmative action program, have you not used this table?

A. As I said, I don't remember seeing this particular table. We get a packet of material from Employment Security Division that is material they developed for use in preparation of affirmative action plans. And some of the material may be the same thing that is shown here, but I don't recognize this particular table as being one that we have used.

MR. CRUTCHER: Okay. Your Honor, I would like to have what is numbered Table 46, "Educational Attainment and Labor Force Characteristics by Race, 1970 and '60, Arkansas General, Social and Economic Characteristics" marked for identification purposes as Plaintiff's Exhibit 4 — I mean 6.

And at this time, I would like to have Plaintiff's Exhibit Number 6 introduced into evidence with the Court taking judicial notice of such said table.

THE COURT: Any objection, Mr. Moore?

MR. MOORE: Your Honor, I would object to [T. 625] Court's taking judicial notice of this table on the grounds of relevance.

THE COURT: No objection to the authenticity of it?

MR. MOORE: Well, Your Honor, he — I'm like Mr. Hunnicutt, I can't identify it and I don't know that it's authentic. I'm not doubting Mr. Crutcher's statement of where he got it. I don't know its authenticity, but he's asking the Court to take judicial notice of it. He's not trying to introduce it through Mr. Hunnicutt. Mr. Hunnicutt indicated he didn't recognize it and is not familiar with it. He's arguing, I understand, that it be introduced on the basis of the Court taking judicial notice of it. And I'm saying that even if it does exist somewhere and it is authentic, it's still irrelevant to the issues in this case if it has educational attainment of the labor force characteristics by race, 1970 and 1960, and I really don't understand it as being relevant to the issues in this case as to these three plaintiffs.

THE COURT: The Court doesn't know whether it's relevant or not, but I'm not going to take judicial notice of it, because it's not a matter of common knowledge I don't know whether it's correct or not. It's not like the law of gravity or things of that type of which one could take judicial notice.

So the request that judicial notice be taken of the [T. 626] facts contained in the exhibit is denied.

Now, Mr. Crutcher, you may offer the exhibit as evidence, which is a different thing entirely than taking

judicial notice. When the Court takes judicial notice of a fact, it is established; it is a fact for purposes of the litigation.

By contrast, when an exhibit is offered, it is simply evidence of the fact and the Court may or may not find the facts as contained in the exhibit.

MR. CRUTCHER: Thank you, Your Honor.

Q. (BY MR. CRUTCHER) I would refer again to what has been marked as Plaintiff's Exhibit Number 6, and, Mr. Hunnicutt, I'd like to direct your attention to the left hand side of the exhibit, approximately one, two, three, and the third set of — titled, "Labor Force Participation by Age", and it has from fourteen years on through, however, beginning with the third line under "males", sub-title "males eighteen and nineteen years of age", does it not have a total number of individuals who would be in this number of 17,256?

A. That's what's indicated on this form that I'm looking at, sir.

Q. Okay. And —

THE COURT: Mr. Crutcher, before you go any farther with this line of questioning, you seem to be attempting to get the exhibit into evidence merely by asking [T. 627] Mr. Hunnicutt to read from it. And he hasn't identified it. As a matter of fact, he has said that he doesn't know what it is.

Do you wish to offer the exhibit into evidence?

MR. CRUTCHER: Yes, Your Honor.

THE COURT: Now, Mr. Moore has objected, as I understand it, not on the grounds of authenticity, but on the grounds of relevance?

MR. MOORE: Right.

THE COURT: Is that correct.

MR. MOORE: May I add now an objection as to his attempting to offer it through this witness. This witness cannot identify it and has not identified it, says he knows nothing about it. So that it cannot be introduced, I submit, through Mr. Hunnicutt on the grounds he can't authenticate it.

THE COURT: Well, we're all in agreement on that. The question is whether or not you were objecting to the lack of authentication?

MR. MOORE: I am now at this time.

THE COURT: The objection is sustained.

Q. (BY MR CRUTCHER) Mr. Hunnicutt, in formulating your affirmative action program for your employer, Westinghouse, have you implemented any specific training period of time for your employees on your various jobs?

A. I'm not sure I understand what you're asking me there.

[T. 628] Q. In formulating your affirmative action program, and I take it that you consider that there are minorities, be it black persons and other minority ethnic groups would be in the industrial society or population here in Pulaski County. And I'm asking you, in formulating that policy, have you inserted in your affirmative action program any attainment of goals in terms of recruitment or placement of any particular number of minorities within the employment at Westinghouse?

A. Yes, sir. We have over the years set goals for placement in various categories. I can't recall just what all



of these goals are. We've been preparing affirmative action plans for a number of years, but I know there have been goals that we have set.

Q. Do you have any specific goals in terms of percentage of your work force being black?

A. I don't believe there's any goal such as this as far as just a percentage of the total work force being black. Again, I'm talking about just from memory.

MR. CRUTCHER: I have no further questions and I pass the witness

THE COURT: Any redirect?

MR. MOORE: Yes, sir.

#### REDIRECT EXAMINATION

BY MR. MOORE:

Q. Mr. Hunnicutt, how long must an employee remain [T. 629] in a job before the employee can bid to another job under the labor agreement?

A. They must remain on a job six months before they can upgrade, or they must remain on a job twelve months before bidding to an equal or lower rated job.

Q. All right. Do you ever have instances where and have you had instances where an employee who has been in a job not the required length of time to move laterally or up and the employee, in order to change jobs, has a change in performance and is disqualified and gets moved to another job as a result of this? Does this ever occur?

A. We have had that type of a situation occur.



Q. In other words, an employee does not like the job that they're performing and they do not wish to wait the required amount of time before bidding out to another job and they, in effect, deliberately allow their performance to drop?

A. We have suspected that was the reason for it. There have been cases where their performance did drop and we knew they were wanting to go to another job.

Q. Okay. Now, let me show you what's been introduced into the evidence previously as Defendant's Exhibit 35, notes of Mr. Turnage, prepared on 3-24-71, and direct your attention to the bottom of the page and begin reading with the statement, "She expressed —." Who are we talking about?

[T. 630] A. We're talking about Christine Vaughn.

Q. All right. What did Mr. Turnage place in that note?

A. Said, "She expressed her dislike for her job and said she wanted to bid off. I explained she hadn't been on the job long enough to bid on a number 4 or less job and that until she has been there long enough, she would have to put more effort into the job she had."

[T. 648]

\* \* \*

TESTIMONY OF CLINTON TURNAGE  
DIRECT EXAMINATION

BY MR. MOORE

Q. State your name, please.

A. My name is Clinton Turnage.

Q. And where do you reside, Mr. Turnage?

A. North Little Rock.

Q. What is your address?

A. 6305 Tall Chief.

Q. Where do you work?

A. Westinghouse Electric.

Q. How long have you worked there?

A. Seventeen years.

Q. What jobs have you held since you began work at Westinghouse?

A. I hired in as a improved lamp group operator, auto stem inserting and mounting.

[T. 649] Q. And did you receive any promotions after that?

A. Yes, sir. I worked there approximately eight years and I went into supervision; I worked in supervision for approximately four years.

Q. What was the period of time that you worked as a supervisor?

A. Approximately four years.

Q. From 1970 until 1974?

A. Yes, sir, approximately.

Q. Before you went into supervision, did you hold any offices with the union?

A. Yes, sir. At the time of my promotion, I was vice-president of our local union. I had to resign the local union vice presidency to take the supervisor's job.

Q. Did you return to the bargaining unit as a rank and file employee at any time thereafter you became production supervisor?

A. Yes, sir. After approximately four years, I went back into the hourly rank and file.

Q. What was your reason for going back into the bargaining unit?

A. I just — I didn't — it was a mutual type thing. I didn't enjoy my work as I should have, I didn't feel, and it was a mutually agreed thing that I go back into hourly.

Q. And since you've gone back in to the ranks of hourly [T. 650] employees, have you been elected to any offices with the union?

A. Yes, sir. The last election about a year ago, I was elected President of our local union.

Q. Who was the President before you?

A. Bob Weiler.

Q. Did Mr. Weiler run for reelection?

A. No, sir.

Q. Did you have any opposition when you ran?

A. Yes, sir. I had two individuals running against me.

Q. Mr. Turnage, let me now direct you to the period of time when you were a production supervisor for the com-

pany. Did you during that period of time have occasion to supervise an employee by the name of Christine Vaughn?

A. Yes, sir.

Q. Do you remember what shift you were working on that time?

A. I was working third shift.

Q. And what was your position at that time?

A. I was a production supervisor.

Q. And how did Miss Vaughn come to be a *supervisor* [sealex operator] on the third shift at that time?

A. Beg your pardon?

Q. Do you recall how she happened to come to you as an employee under your supervision on third shift?

[T. 651] A. I believe she was affected by a reduction in force, and she bumped into that area and took a job. I don't know whether it was open or something. It must have been an open job.

Q. All right. Did you — what job did she move into, Mr. Turnage?

A. Sealex machine, sealex machine operator.

Q. How long did she work in that job?

A. I don't know. She was — she was working in that job on second shift when she came to me. She worked in it on third shift for about three months, I believe.

Q. Were you on third shift?

A. Yes, sir.

Q. Did you have occasion to evaluate Miss Vaughn while an employee under you as a sealex operator on third shift?

A. Yes, sir.

Q. And would you tell us about that, please?

A. Well, it was quite — our production was not what it should have been and we got considerably more defective lamps due to operator type defects.

Q. Miss Vaughn was a sealex operator. What is the relationship of this position to the rest of the jobs in the group that you supervised?

A. Well, the sealex operator, the group that she was on at that time has six other operators, a total of seven [T. 652] people on a group. The sealex machine operator is the one that paces the output of the group.

Q. Mr. Turnage, Miss Vaughn had worked as a sealex operator before she came to you, is that correct?

A. I understand that she did, yes, sir.

Q. And when she came to you, did she receive any additional training from you?

A. Yes, sir. On occasions I assigned utility operators to help her in her job.

Q. What sort of problems did you experience with Miss Vaughn?

A. Well, the problems we experienced was a lack of production. And I tried to motivate her in building her productivity up on this group. And I wasn't able to do it.

Q. Had she performed the same type of sealex machine — on the same type of sealex machine at the previous job that she was working on when she came to you?

A. I don't know.

Q. You don't know whether there was any difference in the two machines?

A. I don't know.

Q. Do you know the supervisor she worked for previously?

A. Mr. Roger Maynard.

Q. Mr. Maynard?

A. Yes, sir, I believe that's correct.

[T. 653] Q. What type of sealex machine would she have been working on for you?

A. It was a standard sealex. It was a three light sealex machine.

Q. Did the stem come to you upright or turn it over?

A. No, sir. The stems come from an overhead chain that comes down in front of the operator and they were upside down. The operator has to flip them to put them into the machine.

Q. Is there a degree — is there a significant degree of difference in that type of operation as opposed to sealex machine operation where the stems come to you upright?

A. I wouldn't think there would be any appreciable difference.

Q. Let me show you now what's been introduced previously into evidence as Defendant's Exhibits 37, 38, 39 and 40, and ask you to look at these exhibits and tell us if you recognize them? What are those?

A. These are notes that I'd written down after meetings, formal or informal, with Christine after I determined that, well, I saw that my talks were not doing any good.

Q. Did she ever complain to you that she had not had adequate training in the job?

A. I don't recall her ever saying that.

Q. Did she ever tell you whether she liked the job?

A. I believe that in one of my notes I stated that [T. 654] she expressed a dislike for her job.

Q. And what did you tell her, if anything, in response to that? Look at your note if you have to.

What's the date of the note you're looking at?

A. I'm not sure that this is one.

Q. I'm directing your attention to Exhibit Number 37 of the Defendant, a note dated 3-24-71, and ask you to look at the bottom of the page of that note.

A. 3-24-71, the last paragraph on the first page, "She expressed her dislike for her job and said she wanted to bid off. I explained she hadn't been on the job long enough to bid on a number four or less job and that until she has been there long enough, she would have to put more effort into the work she had—into the job she had."

Q. Did you make any notes at the time that you supervised her, before she was disqualified, concerning the particular problems that you were encountering with her?



A. Yes, sir.

Q. And what were they?

A. The fact that I had observed a number of sealing heads and exhaust ports that didn't have material or bulbs in them, and the fact that we were getting too many burned wires.

Q. Did you communicate this to her at any time during this period of time prior to her disqualification?

A. Yes, sir, on several occasions.

[T. 655] Q. Did she, after you communicated these problems to her, improve?

A. I think on one of my notes also that I had stated that she had made an improvement for short periods of time. But I didn't see an overall improvement.

Q. Did you have any standards on this job which you told her that she must make each shift or per week in order to be qualified on the job?

A. No, sir. I don't remember telling her that I would put any, or that set standards would have to be met. The machine's down time, and what have you, is figured into productivity of the equipment. I don't recall telling her that I just —

Q. All right, sir. Let me ask you this, did you ever communicate to her just the rate of burned wires that she was experiencing and how that compared with other operators?

A. Oh, yes, sir.

Q. Do you have a note on that?

A. Yes, sir.

Q. Would you refer to that, if you need to, or tell us from your memory if you can remember. But if you need to look at your notes, do.

A. I think the first meeting we had on 3-9-71, and I had a list made out of the three shifts and the number of burned wires per shift. And I had told her at the meeting [T. 656] that I had checked and found that the burned wires were not the fault of the equipment.

Did you want the numbers?

Q. Yes.

A. For the same days on first, second and third shift, third shift has 169 burned wires total for a six day period; first shift had 71 total burned wires; and second shift had 78 total burned wires.

Q. Now, would another member of the group have been responsible for the burned wires?

A. No, sir.

Q. How did you know that?

A. Well, these are sealex — it's sealex machine operator defects and the no other operator would be responsible for those defects.

Q. If you would, look at your notes and tell the Court what was the last warning that you gave Miss Vaughn prior to her final disqualification on the job. Put another way, did you tell her at any point during your evaluation of her that unless she improved within a period of time that you were going to disqualify her?

A. Yeah, I said she would have to improve or I would have to use stronger disciplinary actions.

Q. What's the date of that note?

A. 4-15-71.

[T. 657] Q. And when was she disqualified?

A. 4-19-71.

Q. Was there any improvement, in your judgment as her supervisor, between the period of 4-15 and 4-19?

A. No, sir.

Q. How many sealex—and did you then, is there a note from you to her when you did disqualify her?

A. Yes, sir. There was one on 4-19 and she was informed in the presence of the shop steward, the union shop steward.

Q. What did you tell her?

A. Can I just read this note?

Q. Yes, if you would.

A. "I had a meeting with Christine Vaughn in the presence of shop steward Clarence Stone and informed Christine that due to her obvious dislike for her job the number of operator burnt wires and the fact that they were no better after repeated talks and warnings and her production, which has been unsatisfactory and getting no better, that I had no alternative but to disqualify her from the job of sealex machine operator. I told her that this meant she would not be able to hold that position again. I told her she was being placed on an open job of bulb loader hand, working for Mr. Crowder, as of this night. I also told her she had bidding rights when she goes on the job and could put a request in if she wanted another job. I then turned her over to [T. 658] Mr. Crowder."

Q. Did Christine Vaughn at that time after your conversation with her object to her disqualification?

A. No, sir, not to my recollection.

Q. Did she file any grievance with the union over her disqualification?

A. No, sir.

Q. Did you fill the position of the sealex operator's job from which Miss Vaughn was disqualified?

A. Yes, sir, I believe so.

Q. Let me show you an exhibit that I'm going to mark at this time as our next exhibit.

MR. MOORE: Madam Clerk what number is that?

THE CLERK: 71.

Q. (BY MR. MOORE) I want to show you what I'm marking as Defendant's Exhibit 71, and ask you to look at these three documents that are part of Defendant's Exhibit 71, and ask you if your name appears on any of those documents?

A. Yes.

Q. What are they?

A. This first one is an acceptance notice; the second one is a request form; and the third is a requisition form for an employee.

Q. All right. Can you tell from those documents [T. 659] on the face of the documents or the back of them whether or not the job that Miss Vaughn was disqualified from was posted for bidding?

A. This last document was a requisition for a sealex machine operator replacing Christine. Is that what you're asking?

Q. Yes. But can you look at the document and tell if the job was posted?

A. I don't think it was posted. It was —

Q. Let me turn over and ask you if there's any information on the back of it?

A. Oh, there's information on two individuals on the back that had requisitions in for a sealex machine operator job on the third shift.

Q. At that time?

A. At the time of the requisition.

Q. You were using the requisition system for filling vacant jobs?

A. Yes, sir. It wasn't a bid procedure at that time.

Q. All right. Did employees who were interested in a sealex machine operator's job on the third shift would have previously had requests on file?

A. Yes, sir.

Q. And then you would have gone to that file and filled the job from those requests?

A. Yes sir. Well, we'd turn in a requisition and [T. 660] personnel relations goes through the files and sends us back the requisitions in that file in the order of seniority. Then we go to the first, the most senior individual that has a request in and ask them if they want that particular job.

Q. All right. Who was the most senior individual who had a request in?

A. Patty Sparrow.

Q. And was there anyone else who had bid on the job or had a request in, excuse me?

A. Yes, sir. There was two individuals, Patty Sparrow and Jackie Jackson.

Q. And who had the oldest seniority date?

A. Patty Sparrow had seniority over Jackie.

Q. And who was awarded the job?

A. Patty Sparrow was awarded the job.

Q. And that's shown on which document, Defendant's Exhibit proposed Number 71?

A. On the first, the acceptance notice.

MR. MOORE: I would now offer into evidence Defendant's Exhibit 71.

THE COURT: Any objection?

MR. CRUTCHER: No Objection.

THE COURT: Let it be received.

Defendant's Exhibit Number 71, received in evidence.

[T. 661] Q. (BY MR. MOORE) Do you know, of your knowledge, the race of the two individuals who had requests on file at that time for this position?

A. Yes, sir. Patty Sparrow is a white female and Jackie Jackson is a black female.

Q. Mr. Turnage, while you were a production supervisor, did you ever have occasion to disqualify any other employees?

A. Yes, sir.

Q. How many did you disqualify during your period as a production supervisor?

A. I think I've only disqualified one other individual.

Q. And who would that have been?

A. His name was Russell Sutton.

Q. And what shift were you working on at the time you disqualified him?

A. I was working on the first shift at that time.

Q. You were production supervisor on first shift?

A. Yes, sir.

Q. And what job was Mr. Sutton disqualified from?

A. He was disqualified from a machine attendant, sealex and basing.

Q. And what was the reason for your disqualification?

A. His inability to maintain the equipment at an acceptable level.



[T. 662] A. He maintains the sealex machines and the basing machines. He had a two machine work load.

Q. Do you know, in relation of time, whether this was before or after the period of time that you disqualified Miss Vaughn.

A. Yes, sir. It was after; I don't know how long after. I was on third and transferred to the first shift in that order. And I disqualified Russell from the first shift. That was the last shift I worked.

Q. What is the race of Russell Sutton?

A. He's white.

Q. Did you ever have occasion to fail to qualify a probationary employee while you were production supervisor?

A. Yes, sir. I let one go before his probationary period.

Q. How long is or was the probationary period at the time that you failed to qualify this employee?

A. I'm not sure. I think it was a sixty day probationary period with an extended for a sixty day period.

Q. And who was the individual, if you recall, that you failed to qualify who was in probationary status?

A. I don't recall his name.

Q. Do you recall the job that he was filling at the time that you failed to qualify him?

A. Yes, sir. He was a machine attendant, twin turret [T. 663] sealex and coating.

Q. At this time were you a production supervisor on the first shift?

A. I believe I was production supervisor on the second shift at that time.

Q. And was this a male or female?

A. It was a male.

Q. And what is his race?

A. He was a white individual.

Q. So during a period of approximately four years, or three and a half years, between 1970 and 1974 while you were a production supervisor, you only disqualified or failed to qualify three persons?

A. Yes, sir.

Q. And one of whom was Christine Vaughn?

A. Yes, sir.

Q. Who is black, is that right?

A. Yes, sir.

Q. And the other two were white males?

A. Yes, sir.

Q. Do you know what job Miss Vaughn went to after she was disqualified by you?

A. Yes, sir. She went to a bulb loader hand.

MR. MOORE: One moment, Your Honor. I pass the witness.

[T. 664] THE COURT: You may cross examine, Mr. Crutcher.

MR. CRUTCHER: Thank you, Your Honor.

### CROSS EXAMINATION

BY MR. CRUTCHER:

Q. Mr. Turnage.

A. Yes, sir.

Q. What's the extent of your formal education?

A. I'm a high school graduate.

Q. Okay. How were you made aware of the vacancy in the supervisory level there at Westinghouse?

A. I was offered the job after — I don't know just how it came about that the vacancy, or how the vacancy came about, but the plant manager at that time asked me if I would — that I was being considered for supervisory position and asked if I would consider it.

Q. Okay. Had you not gone to the plant manager to let them know that you were interested in a supervisory job?

A. No, sir.

Q. They came to you?

A. Yes, sir.

Q. What was that manager's name?

A. Mr. — I can't tell you his name, I'm sorry. Mr. Kappler; Mr. Kappler at that time.

Q. Okay. Did he explain to you what — well, number [T. 665] one, were there any qualifications to be a supervisor?

A. I didn't know of any, as such. But I don't know of any; I'm sure there must be some, but I didn't know of any specific qualifications, no, sir.

Q. Okay. How long had you been there before you were approached to be a supervisor?

A. I'd been there eight years.

Q. Eight years. And you were working as a production worker?

A. Yes, sir.

Q. And this individual came to you and let you know that there was a supervisory position vacant or one coming up?

A. Yes, sir.

Q. It was coming up?

A. It was coming up.

Q. All right, Mr. Turnage, at the time that Mrs. Vaughn was placed under your supervision as a sealex operator, how many different types of sealex machines were there?

A. They are all built on the same basis — it's the same basic machine. Some of them, I don't know that they would be classified as types; there were probably three.

Q. Three. Three different —

A. Three different make-ups. Like I say, I don't know that they would be called types. We had a standard group, a three light group and on group 39 was a big R-40 group. Like I say, [T. 666] I don't know that they would be classified as types of sealex machines. They are all basically the same machine.

Q. But you've got three sealex machines that are different some way in terms of either make-up or the way that they operate?

A. Yes, sir, basically.

Q. Okay. Do you know — well, tell me, what machine or what type of machine was Miss Vaughn placed on under your supervision?

A. Well, she was placed on a three light machine.

Q. Three light?

A. Three light machine.

Q. Okay. How does that machine operate?

A. The bulbs are conveyed to the sealex machine operator, then she places the bulbs on the coating shuttle, at which time she also has an overhead mount conveyor that brings the mounts in front of her; and she will take the mount and invert it and put it into the — into a mount pin, into — it's guided into a mount pin by a — they call it an operator aid. It was a split type funnel that closed up around the hole that she was to put it in.

Q. Do you know what type she had worked on under her former supervisor?

A. No, sir, I don't know.

Q. Did you ask her?

[T. 667] A. I don't recall asking her, no.

Q. Were you aware when Mrs. Vaughn came into your department that she had reached a higher rate of pay on the particular sealex machine that she had been working on?

A. I didn't recall at what rate of pay. I'm sure that I was aware of the fact she was drawing top pay, because I had not gotten any pay vouchers to raise her pay.

Q. Is it possible though that she had been working on a different type of sealex machine under her former supervisor when she came to you?

A. Yes, sir, it's possible.

Q. Okay. Did you go through any training period yourself with Mrs. Vaughn?

A. No, sir. Well, I had had her working with some of the utility operators to show her in what way she could improve her particular operation there.

Q. But you yourself did not train Miss Vaughn?

A. No, sir.

Q. Okay. Do you know whether or not all of these utility operators that you had working with Mrs. Vaughn were qualified on the sealex?

A. Yes, sir. I think I can say that the ones that I had working with Christine were qualified, yes, sir.

Q. And each person works in a different way, though, right?

[T. 668] A. Yes, sir.

Q. Okay. And after you saw that Mrs. Vaughn was having difficulty producing as to the standards that you had set, did you yourself give her any training?

A. Yes, sir. I had her working with different operators.

Q. I'm talking about, did you yourself take time to work with Mrs. Vaughn?

A. No, sir.

MR. CRUTCHER: I have no further questions.

THE COURT: Any redirect, Mr. Moore?

MR MOORE: Just a moment, Your Honor.

#### REDIRECT EXAMINATION

BY MR. MOORE:

Q. Mr. Turnage, let me direct your attention to Defendant's Exhibit Number 39, dated 4-15-1971, and ask you to look at that and read that over.

A. You want it read aloud?

Q. It's very brief, if you would, please, sir.

A. It says, "Talked to Christine Vaughn this A.M. about the number of lamps she was sealing, which fell far short of production, also about the number of operator burned wires and pointed that she had twenty-two so far tonight at 2:30 A.M.; and on 4-14-, there were sixty on 4-13, fifty, et cetera. I pointed out that she was [T. 669] missing far too many heads to be able to get production and told her



that I had watched her on occasions and saw three to four empty heads in sorts on the sealex. I mentioned that this was ten percent or more of the heads that she was missing and at that rate, it would be impossible to get production. Told her I was watching her and compared her with first and second shift and she fell far short of either one on production and ran far more burned wires. Told her she averaged one case behind every hour and she would have to improve or I would have to use stronger disciplinary actions. At one point in the meeting, I had to stop to ask if she was asleep, as she had her eyes closed. She opened them and said she wasn't. Also at the meeting was shop steward Clarence Stone. In the next rack that was picked up, there were forty-one burned wires, operator; total of seventy-eight; total production, ninety-one, eighty with forty minute relief time.

Q. After you told her about this in the meeting and she closed her eyes and appeared to you to be sleeping, did she ask you for some training on how to perform her job?

A. No, sir, not to my recollection.

\* \* \*

[T. 672]

TESTIMONY OF O.D. BRAZIL  
DIRECT EXAMINATION

BY MISS RAINEY:

Q. Would you state your name, please?

A. O.D. Brazil.

Q. And your address, Mr. Brazil?

A. Number 6 Robinwood.

Q. Where are you employed, Mr. Brazil?

A. Westinghouse Electric Corporation.

Q. How long have you been employed by Westinghouse?

A. Thirty years.

Q. What would have been the first year that you began employment with them?

[T. 673]A. In what capacity, is that what you're asking?

Q. What year did you begin your employment with Westinghouse?

A. Oh, pardon me. 1949.

Q. What was your position when you came to work with Westinghouse?

A. I was a machinist.

Q. How long did you hold that position?

A. From 1949 to 1969.

Q. What was your position after you held that position of machinist?

A. Manufacturing supervisor in the three-way department.

Q. On what shift?

A. Second shift.

Q. How long did you hold that position?

A. From 1969 to 1970.

Q. What was your next position that you held?

A. And from there, I went to manufacturing supervisor, Sig, second shift.

Q. How long did you hold that position?

A. From 1970 until 1972.

Q. Mr. Brazil, would you try and testify from your memory of events, rather than from your notes?

A. Well, —

Q. I know that's just an aid to your memory, but would [T. 674] you just try and testify from your memory?

You say that you worked second shift in the Sig department?

A. Yes.

Q. All right. How long did you hold that position?

A. Two years.

Q. And what years are those — would that have been?

A. '70 to '72.

Q. Okay. And what was your next position?

A. Master mechanic, first shift.

Q. On what shift, first shift?

A. Yes.

Q. How long did you hold that position?

A. About three years.

Q. What years?

A. 1972 to 1975.

Q. All right. And what was your next position?

A. General foreman, first shift.

Q. Are you currently employed in that position?

A. Yes.

Q. Did you ever have an occasion to supervise an employee by the name of Christine Vaughn?

A. Yes, I did.

Q. When did you first supervise Miss Vaughn?

A. November, 1970 to January, '71.

[T. 675] Q. Where was she working at this time?

A. I believe she was a hand bulb loader.

Q. How many hand bulb loaders, or how many bulb loaders were you supervising at this time?

A. Nine.

Q. And how many of those nine were black?

A. Four.

Q. Was there ever a time when work would run out on a machine, on the bulb loader machine?

A. Yes, yes.

Q. Who would be out of work if the bulb loader machine was down?

A. Well, approximately the entire crew.

Q. And who's the crew composed of, what jobs?

A. Mount inspector, final inspector, hand bulb loader, and the sleeving operator.

Q. All right. What would the employees do if their work ran out?

A. Well, they're expected to start their sweeping. When the group goes down, they automatically start cleaning up, sweeping and picking up around the area.

Q. Okay. Would these be both black and white employees that would be sweeping the area?

A. Yes.

Q. Did Miss Vaughn sweep around the area with other employees?

[T. 676] A. Yes, she's instructed to sweep the area.

Q. Would she automatically begin to sweep with the other employees when the machine was down?

A. We had some difficulty in this area.

Q. What was your difficulty?

A. She wasn't — she wasn't one to respond to this automatically; she had to be instructed to do it.

Q. So she would sweep after having been instructed to do so?

A. Yes.

Q. At the time you supervised Miss Vaughn, approximately how many other employees did you supervise?

A. About sixty-five.

Q. Approximately how many of these were black?

A. About thirty percent.

Q. At this time, I'd like to show you what's been introduced as Defendant's Exhibit Number 32. [sic 36.] Do you recognize this document?

A. Yes.

Q. What is it?

A. This is a change in employee status, we call it a green copy. This is used when she changes jobs.

Q. Would transfer from one job to another?

A. Yes.

Q. All right. Who prepared this document?

[T. 677] A. I did.

Q. In the space, I believe it's on the back of the green copy, there is an area marked "employee evaluation." The supervisor is asked the question if he would re-hire the employee. What did you state after that question?

A. I stated no.

Q. What was the reason that you would not have recommended Miss Vaughn's re-hire?

A. I could not get production.

Q. All right. And what were her problems? What caused her not to get production?

A. Christine didn't keep the heads full on the sealex; she didn't fill each head —

Q. And we're talking about the job of bulb loader hand here, are we not?

A. No, this is sealex operator.

Q. Was the sealex machine with the loader?

A. On the sealex job, she missed many heads.

Q. Okay. So that caused production not to be what it should have been, is that correct?

A. That's right.

Q. What did you mark as being the quality of Miss Vaughn's work?

A. I marked it "poor."

Q. And quantity?

[T. 678] A. I also marked that "poor."

Q. How did you determine that the quantity of her work was not up to par?



A. Well, again, it was the missing of the sealing heads.

Q. Did you talk to Miss Vaughn about her job performance?

A. Yes, we did.

Q. And what was Miss Vaughn's reaction?

A. Well, she would listen, but it never improved. It remained poor.

Q. What did you indicate as the employee's weakest points on this evaluation?

A. Absenteeism and lateness.

Q. What had you observed about Miss Vaughn's attendance?

A. Well, I observed that she came in late too often and also absent. It was a continuing problem.

Q. What job does that indicate that Miss Vaughn had bid on?

A. Another sealing job.

Q. Thank you. Did you ever have occasion to supervise Miss Vaughn again on another occasion?

A. Yes, I did.

Q. Do you know approximately when this would have been?

A. 1971 and 1972.

Q. All right. At this time I'd like to show you what's [T. 679] been marked as Defendant's Exhibit Number 46 A and B. Do you recognize this document?

MR. MOORE: Excuse me, Your Honor, one moment, please. May I have just a moment?

THE COURT: Yes, sir.

Q. (BY MISS RAINEY) Do you recognize that document, Mr. Brazil?

A. Yes, I do.

Q. What is it?

A. It's a discipline report; we call it a written warning.

Q. All right. How did Miss Vaughn come to receive this written warning?

A. Miss Vaughn received this after several discussions about her lateness and then a verbal warning with the steward. And it continued, and then we issued a written warning.

Q. So the written warning was a reprimand for her continual lateness and absenteeism, is that correct?

A. Yes.

Q. Who gave Miss Vaughn this warning?

A. I presented it to her with the shop steward.

Q. When is the warning dated?

A. September 26th, '72.

Q. And you said that Miss Vaughn had received an oral, verbal warnings prior to receiving this written notice?

[T. 680] A. Yes.

Q. How many verbal warnings had she received prior to receiving the written notice?

A. One.

Q. One oral?

A. One verbal warning with the steward.

Q. Had she received any informal warnings prior to that warning in front of the shop steward?

A. Yes.

Q. On how many occasions?

A. Three different occasions.

Q. All right. Looking at part B of Exhibit 46, how many times had Miss Vaughn been tardy in the month of September? Would you count that up for me, please?

A. Seven times.

THE COURT: What year is that, Miss Rainey?

MISS RAINEY: We're talking about 1972, or excuse me. Is that 1972?

THE WITNESS: Yes.

Q. (BY MISS RAINEY): In the month of September, how many times had Miss Vaughn been late?

A. Oh, pardon me. Pardon me. Three times.

Q. Had she been tardy prior to the month of September?

A. Yes.

Q. How many times?

[T.681] A. Two times.

Q. What action was to be taken if Miss Vaughn's attendance did not improve after having been given this written notice?

A. Well, the next step in the disciplinary program would be a three day furlough.

Q. A disciplinary furlough?

A. Yes.

Q. How much longer did you supervise Miss Vaughn after you issued this written notice to her on 9-26-72?

A. As I recall, about a month and a half.

Q. Did her attendance record improve?

A. No.

Q. Did Miss Vaughn ever file a grievance over having received this notice, written warning?

A. I don't recall.

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CROSS EXAMINATION  
[T. 685]

BY MR. CRUTCHER:

Q. Just a few questions, Mr. Brazil. What was the initial date, to the best of your recollection, that Mrs. Vaughn was placed under your supervision?

A. I believe it was about 1970.

Q. Would November 16th, 1970 be that date?

A. Well, it's been a long time. I'd say approximately in that area, yes.

Q. Okay. I show you what had been identified as Defendant's Exhibit 35. It deals with the person by the name of Vaughn. And on a sheet dated November 16, 1970, the person named Vaughn, the remarks, "transferred to Mr. Brazil's section, rate increased to top pay, occupation, sealex machine operator", is that correct?

A. It appears that way, yes, sir.

Q. So when Miss Vaughn was working under your direction, she received top pay on the sealex machine, is that correct?

A. That's what it says, yes, sir.

Q. Okay. I show you another sheet that's dated 1-25-71, in regards to C. Vaughn. It says "change in shift due to reduction in force. Transferred by requisition number 70-477." Is this the date in time that Mrs. Vaughn left from under your direction as a sealex operator?

A. According to that record, yes, sir.

[T. 686] Q. So when she left from under you, she was at top pay of a sealex operator?

A. That's the way it appears, yes, sir.

Q. Okay. What sealex machine was she working on under your direction?

A. I recall it was a three-way group.

Q. Now, when did you start having some attendance problems with Mrs. Vaughn?

THE COURT: Excuse me, Mr. Crutcher. Let me ask a question here.

Mr. Brazil, is that three-way the same as a three light?

THE WITNESS: Yes, sir.

THE COURT: Same thing?

THE WITNESS: Yes, sir.

Q. (BY MR. CRUTCHER) When did you begin to have some attendance problems with Mrs. Vaughn?

A. Well, I recall that it was immediately, right away after she came in the department.

Q. Okay, but so far as to production, she was doing the job?

A. No, sir, I didn't say that.

Q. Well, she came in under your supervision, she received top pay retroactive to the effective date that she came under your supervision, is that not correct?

[T. 687] A. According to the record, yes, sir.

Q. Do you know whether or not her pay was reduced before she left out from under your supervision?

A. Not to my knowledge

MR. CRUTCHER: I have no further questions.

THE COURT: Any redirect, Miss Rainey?

MISS RAINEY: Yes, Your Honor.

# REDIRECT EXAMINATION

BY MISS RAINEY:

Q. Mr. Brazil, did you ever disqualify employees Vaughn, Gee or Crutcher from any position that they held while they were under your supervision.

A. No, I don't believe I did.

Q. Did you ever take any action that resulted in their suspension from the job?

A. No, I didn't.

Q. All right. Did you ever take any action which resulted in them receiving a reduction in pay or any loss of pay during the time that you supervised any of them?

A. No, I don't believe so.

\* \* \*



[T. 708]

TESTIMONY OF CHRISTINE VAUGHN  
DIRECT EXAMINATION

BY MR. CRUTCHER:

Q. Miss Vaughn, your initial date of employment at Westinghouse was sometime in 1971 or '70?

A. Right.

Q. Do you recall the exact date?

A. July 13th.

Q. 1970?

A. Right.

Q. So in 1974, you had worked there approximately four years?

A. (No audible response)

THE COURT: Would you speak up, Miss Vaughn? I can hardly hear you.

THE WITNESS: Yes.

Q. (BY MR. CRUTCHER) Okay. During this period of time, had you performed on various jobs?

A. Well, when I got hired in I went in as a sealex operator; and then as of '74, I was a hand bulb loader, because I had gotten disqualified off of the sealex.

Q. Okay. And had you ever received top pay as the [T. 709] sealex machine operator?

A. Yes.

Q. Okay. And you were disqualified sometime in '71?

A. Yes.

Q. After your disqualification, have you since been given an opportunity to requalify as a sealex machine operator?

A. No.

Q. Has anyone come to you and said there was a possibility that you could become qualified again?

A. Well, I had got bumped two or three times. And as far as my bumping papers and seniority rights, I am still qualified as a sealex operator.

Q. How do you know that you're still qualified?

A. Because each time that you get bumped they show you a sheet that you have to sign saying, you know, authorizing the fact that you got bumped; and also it has on there the different jobs that you've done, if you've done more than one job, and are qualified on. Or either they will have on there what jobs are open and leave it up to you to decide which one you want.

And on my bidding rights, the first job that I'm still qualified to do is sealex. And I've been bumped more than once. But the fact still remains that I'm still qualified as a sealex operator.

Q. Okay. As to the other jobs that you have performed [T. 710] there at Westinghouse, had you received top pay on them?

A. Yes.

Q. What jobs are they?

A. Final inspector, stem and mount operator, automatic bulb loader, sleeving operator.

Q. Okay. As a utility operator, have you worked in that position before?

A. No.

Q. Okay.

A. That would be all. I was on it for about a year, that would be all. But I had to train for every position, because you have to know how to do every job for each young lady that you have to relieve.

Q. So if being a utility operator there may be some occasions when you have to operate the sealex machine?

A. Not in the department where I was a utility girl, because the sealex is an automatic sealex in the sig department where had I bidden on a utility in standard group, I would have had the opportunity to mount inspect, had I received the job if I bidden on it.

Q. Okay. Now, you heard the testimony of Mr. Turnage that in 1974, I believe, he went up to management?

A. Yes.

Q. Okay. Before Mr. Turnage became a manager or [T. 711] supervisor, did anyone from the front office apprise you of the fact there was a vacancy for a manager or supervisor?

Q. All right. And the third shift, what were the hours of the third shift?

A. 11:00 to 7:00, but I was still doing the same job.

Q. You were doing the same job but you were on the late night shift?

A. Right. And I also was on a different machine from what I originally had been trained on.

Q. Okay. So there was some difference in the machine [T. 714] that you were originally trained on?

A. Yes.

Q. And you were also working at a later hour in the evening?

A. Yes.

Q. Do you — let me show you this document. All right. I have it now.

Let me go back and put it this way: When you were moved from second shift to third shift, you did not want to do that at your request?

A. No.

Q. Okay. Now, that was when you were a sealex operator?

A. Yes.

Q. Okay. You would have preferred to have stayed on second shift?

A. Well, I really had no choice, because if you get bumped you have to take whatever is there.

Q. I understand. But if you had had your preference you would have preferred to have stayed on second?

A. I had a preference; I could have stayed on second.

Q. But you went ahead and went to third shift?

A. Yes.

Q. In a different job than you could have stayed on in second shift?

[T. 715] A. Yes.

Q. What was the job you could have stayed on in second shift?

A. I could have been a baser or inspector packer final, but I hadn't had any training, and, therefore, since I was already a sealex operator, I just preferred to stay on what I was already doing.

Q. All right. Now, you stated that you had seen a bump sheet in which it was listed that one of your jobs that you had previously satisfactorily performed was a sealex machine operator. Would this — would you look at Defendant's —

A. This is the last bump sheet that I saw, which was in '78. And I have been bumped two or three times prior to this particular bump sheet.

Q. All right.

A. And as you can see, utility operator.

Q. Well, I'm not talking about that. I want to ask —

A. But sealex —

Q. — you what you saw on the sheet?

A. Yes.

Q. It was a sheet like this?

A. Yes.

Q. All right. Did you, after you saw that, did you ever attempt to bid on a sealex operator's job when one was posted?

A. No.

[T. 716] Q. Now, let me show you what was introduced into evidence as Defendant's Exhibit 49 C, and ask you to look at this. Does this have your signature on it?

A. Yes, it does.

Q. Did you fill that out?

A. Yes, I did.

Q. All right. Miss Vaughn, let me ask you if you will look at question number 22. Would you read that question and tell what answer you gave? What's the question?

A. "Have you ever been turned down for a job which you requested or bid on at Westinghouse which you believe you were qualified to do?"

And I answered no, because everything I had bidden on, I had got.

Q. And what was the question in number 23?

A. "Are there any particular higher paying job at this plant for which you would like to be trained?"

And I said no.

Q. And what are you working at at the present time?

A. I am a sleeving operator.

Q. And what is the labor grade?

A. Three.

MR. MOORE: All right. Thank you, Miss Vaughn.

\* \* \*





# AGREEMENT

*Between*

WESTINGHOUSE ELECTRIC  
CORPORATION

INCANDESCENT LAMP DIVISION  
*of* LITTLE ROCK, ARK.

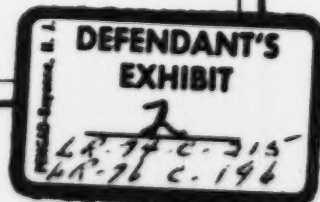
*and*

INTERNATIONAL BROTHERHOOD  
*of* ELECTRICAL WORKERS

LOCAL UNION No. 1136



Entered into March 16, 1970



### Sec. 3.5—Decrease in Working Force

At the time of layoff due to reduction of force within any department, accumulated length of service will govern if the employe has had previous satisfactory experience on the job of the least, or less senior employe. The Displacement Procedure will be in the following order:

- (a) **Least Senior on Job Affected**—At the time of a decrease in force, the Foreman will remove the least senior employe on the job affected, except in Labor Grades 7 and above, the least senior employe not out of his training period will be removed.
- (b) The displaced employe may have the choice of 1, 2, 3 or 4. If this does not result in placement on the shift that the employe was cut back from, then the displaced employe may have the choice of (c), on that shift.
  - (1) **Displace least senior—same job.** The surplus employe may displace the least senior employe on the same job on his shift, or may displace the least senior employe on the same job on another shift.
  - (2) **Return to job previously performed.** The employe may displace the least senior employe in any department on any job where he has had previous satisfactory experience.
  - (3) **Open Job.** Employe may fill an open job in the plant (consistent with the employe's qualifications).
  - (4) **Replace new employe.** He may displace a new employe still within their probationary period, if qualified to perform the duties of the job.
- (c) **Displace Least Senior in Grade No. 1**  
If this does not result in placement, he may displace the least senior employe in Labor Grade No. 1.
- (d) **Offer of Job in Grade No. 2**  
If this does not result in placement, Management will offer the employe the opportunity to displace either the least or a less senior employe in Grade No. 2 (consistent with the employe's qualifications).
- (e) **Replace Least Senior in an Occupation**  
If this does not result in placement, he may displace the least senior employe in some other occupation if the job requires only a reasonable amount of training, and he is qualified to perform the duties of the job.
- (f) **Release of Displaced Employes**
  - (1) When the employe cannot be placed through the above procedure he will be laid off and his name placed on the Inactive Seniority Recall List.
  - (2) **Layoff**  
At the time of layoff, an employe on personal leave of absence or on the disability roll will be laid off and his name will be added to the Inactive Seniority List, when, because of his seniority status under the established seniority procedure, he would have been laid off

if he were actively at work. Notice of such layoffs will be given to the Local and to the employee involved at his last known address, but the usual notice periods outlined in Section 3.5 (g) shall not apply. Any objection to such layoff must be made by filing a grievance within two (2) weeks following the giving of such notice to the Local. Layoff pursuant to this provision shall not affect any right to benefits or coverage under the Westinghouse Insurance Plan to which the employee has already become entitled prior to the layoff, either for himself or his dependents, by reason of his disability or leave of absence. It shall be the obligation of such disabled employee to notify the Company of his availability for re-employment, and until such notification, the Company will have no obligation to offer such disabled employee re-employment. Such disabled employee on the Inactive Seniority List who is still disabled at the time he is recalled will be returned to the disability roll if he so requests at that time. The period on disability prior to layoff and the period during which he is returned to the disability roll will be considered as a single continuous period.

**(g) Notification to Employees and Union**

Employees selected for layoff shall be advised three (3) working days before layoff becomes effective. The Steward shall be notified at the time the notice is given to the employee. Such employees will be given three (3) days work, or pay if work is not provided.

\* \* \*

**Sec. 3.7—Failure to Qualify**

An employee, who fails to fulfill the requirements of the job, shall be returned to his former job at his former job rate. The Steward will be notified of the employee's failure to qualify before he is returned to his former job. The incumbent on the original employee's former job shall be returned to his former job at his former rate. This procedure will continue until all employees affected by the original move have been reinstated in their former jobs. The new job will then be considered open again, but the employee who failed to qualify for it will not be considered to fill the opening.

\* \* \*

**ARTICLE VII**

**GRIEVANCE PROCEDURE**

**Sec. 7.1—General**

Should any differences arise between the Company and the Local Union as to the meaning and application, or the observance or performance of any of the provisions of the Agreement, the following shall be the procedure for the adjustment and settlement thereof. Grievances must be initiated within ten (10) days of the first occurrence of the act giving rise to the grievance. Discharge grievances must be filed within five (5) working days from the date the Local Union is notified of discharge, and lay off grievances must be filed within two (2) weeks from the date the Local Union is notified.

**Sec. 7.2—Grievance Step #1—Foreman**

The grievance shall be taken up by the shop steward and/or the employe with the immediate supervisor of the employe. If the grievance is not settled, it shall be reduced to writing, and a written answer given by the immediate supervisor of the employe within two (2) working days after receipt of the written grievance.

**Sec. 7.3—Grievance Step #2—Industrial Relations**

If the grievance is not resolved at the above Step (7.2), it shall then be referred to the Local Manager or the Industrial Relations Representative who shall arrange a meeting with the Local Union Grievance Committee.

Management's disposition in writing will be given within eight (8) working days of the receipt of the grievance.

**Sec. 7.4—Grievance Step #3—Appeal Grievance Procedure**

If the grievance is not resolved or adjusted in Section 7.3 above, it may be referred by the Local Union in writing to the General Manager of the Incandescent Lamp Division, or his designated representative, and the International Vice President of the Union, or his designated representative. Either the International Vice President of the Union, or his designated representative and the General Manager of the Incandescent Lamp Division, or his representative, shall meet to resolve the grievance.

Written replies shall be given to grievances at the Appeal Level within fifteen (15) working days following conclusion of the Appeal Level meeting unless Management advises the Union at such meeting that additional time may be required. In that event, the written reply shall be given within thirty (30) days following the conclusion of the Appeal Level meeting.

**Sec. 7.5—Extension of Reply Periods**

The above limits will be adhered to unless there is a mutual agreement in writing regarding an extension of time between the Local Union and Management, or if on the Appeal Level, between the Union and Management.

**Sec. 7.6—Arbitration of Disciplinary Matters**

The preceding Sections of this ARTICLE VII shall apply to grievances protesting disciplinary penalties or discharges, except that the grievance procedure shall not be deemed exhausted until the parties have further exhausted the demand arbitration provisions which follows:

- (a) Any grievance which clearly protests a disciplinary penalty or discharge of an employe covered by this Agreement and who is not a probationary employe, and which remains unsettled after the procedures outlined in preceding sections of this ARTICLE VII have been exhausted, shall be submitted to arbitration upon the written request of the Union or the Company, subject, however, to the following terms, conditions and exceptions.
- (b) Such request shall be made within thirty (30) days after the date of the Company's answer at the appeal level of the grievance procedure. If no request for arbitration is made by either the Union or the Company during such thirty (30)

day period, both parties shall be deemed to have waived their right to make such request and the grievance will thereupon be closed for all purposes. Employees in the bargaining unit covered by this Agreement cannot, except through the Union or Local Union, initiate or invoke the arbitration procedures set forth in this Section 7.6.

- (c) The grievance must allege that, and the arbitrator's authority shall be limited to determining whether, the discipline or discharge of an employee within the bargaining unit was imposed without just cause. The Union and the Company hereby specifically agree that all other grievance issues are excluded from demand arbitration, and may be arbitrated only upon the mutual consent in writing of the Union and the Company.
- (d) Within fifteen (15) days after receipt of a request for arbitration of a discipline or discharge grievance, representatives of the parties shall attempt to reach mutual agreement on the arbitrator. If the parties fail to reach such mutual agreement on the identity of the arbitrator within the fifteen (15) day period, either party may, but only within ten (10) days thereafter, request the American Arbitration Association to submit a list of names from its panels.
- (e) No arbitrator shall be appointed by the American Arbitration Association who has not been approved by both parties unless and until the parties have had submitted to them three (3) lists of arbitrators from the Association's panels, and have been unable to select a mutually satisfactory arbitrator therefrom.
- (f) The American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if the Company shall advise the Union and the Association that the grievance desired to be arbitrated does not raise an arbitrable issue under the terms of this Agreement.
- (g) In the selection of an arbitrator and the conduct of any arbitration proceeding, the Voluntary Labor Arbitration Rules of the American Arbitration Association, as amended and in effect on July 1, 1958, shall control, and no subsequent modifications of such rules of the Association will be applicable to this Agreement without the specific mutual consent in writing by both parties.
- (h) No more than one (1) dispute may be submitted to any one (1) arbitrator at any one (1) time nor in any one (1) case except by mutual agreement of the parties.
- (i) A transcript shall be made of the proceedings at every arbitration hearing, with the original to be furnished to the arbitrator and the cost thereof to be divided equally between the parties.
- (j) It is the intention of the parties that only those disputes which clearly come within these arbitration provisions shall be arbitrable. No other subjects, direct or collateral, shall be arbitrable except by a mutual written agreement signed by the Company and the Union. Limitations placed upon arbitrability herein shall also be deemed limitations on the scope of the arbitrator's authority, and more specifically, no arbitrator shall have the authority to hear any case or

to review, revoke, modify or enter any award with respect to any matter involving the interpretation or application of any provision of this Agreement or of any local supplement to this Agreement, any matter relating to any pension and/or insurance agreement between the parties, any pension, insurance or other benefits plan referred to or made a part of any such agreement, or the establishment, change interpretation, application or administration of any such pension, insurance or other benefits plan, nor shall any arbitrator have any authority to hear or make any award in a case involving the discipline or discharge of any employee during his or her probationary period. Further, no arbitrator shall have any authority to make any award requiring payment to any employee for any period more than thirty (30) days prior to the date of the filing of the grievance. The award of an arbitrator shall be in writing and, if within the scope of his authority, shall be final and binding upon the parties to this Agreement, the employee or employees involved in the grievance, and the Local Union representing the bargaining unit in which the grievance arose.

- (k) The arbitrator shall not, by virtue of this Agreement or the Rules of such Association or otherwise, compel either party to produce new evidence (not already presented during processing of the grievance in the grievance procedure) considered by such party to be confidential or not relevant or material to the proceeding, or which is not available.
- (l) The arbitrator shall not, in any manner or form whatsoever or directly or indirectly, add to, detract from, or in any way alter the provisions of this Agreement or any Supplement to this Agreement.

#### **Sec. 7.7—Arbitration Expenses**

Each party shall defray the expenses in presenting its own case. All the expenses of the arbitrator shall be borne equally by both the parties hereto.

#### **Sec. 7.8—Exhaustion of Grievance Procedure**

When the grievance procedure has been exhausted as provided in ARTICLE VII, and in the event of a strike in the Bargaining Unit which is authorized by the International Office of the Union, such strike, when so authorized, shall not be a violation of this Agreement if all of the following conditions are satisfied:

- (a) If written notice has been received that Management's appeal level reply (ARTICLE VII—7.4) is unsatisfactory, and
- (b) If the grievance is not subject to arbitration, under ARTICLE VII—7.6, and
- (c) If written notice of the the Union's authorization to the Local Union to strike has been given to the Company not less than three (3) days prior to the strike. When the Company has questioned the arbitrability of a grievance under ARTICLE VII—7.6, subparagraph (f), the Local Union shall have the right to strike in support of such grievance after satisfying condition "c" of this paragraph.

#### **Sec. 7.9—Adjustment Date (Grievance)**

The date the grievance was submitted to Management in writing shall be the effective date of any adjustment resulting from the settlement of any grievance.



**Sec. 7.10—Notification of Non-Acceptance of Reply**

If at any stage of the grievance procedure Management's answer in writing to a grievance is unsatisfactory, the Local Union's reasons for non-acceptance will be reduced to writing.

**Sec. 7.11—Infraction of Company Rules**

In case of an infraction of Company rules, Management may immediately, without notice period, suspend the employee involved, and the Local Union shall be notified, with the reasons therefor by certified mail, within twenty-four (24) hours. The employee's papers shall not be cleared for five (5) working days, during which period the Local Union may enter a grievance if in its opinion an injustice has been done. If no grievance is entered during the five (5) day period the employee shall be considered to have been discharged and his papers shall be cleared.

**Sec. 7.12—Strikes—Stoppages—Lockouts**

In view of the mutual interest of the parties in uninterrupted production, the parties agree as follows:

- (a) That the Union and the Local Union assenting to this Agreement shall not cause or sanction their members to cause or take part in any strike, (including sit-downs, stay-ins, slow-downs, or any other stoppage of work) during the life of this Agreement, except as provided in ARTICLE VII—Section 7.8.
- (b) That the Company shall not cause or sanction a lockout because of any dispute with the Union or the Local Union during the life of this Agreement.

**Sec. 7.13—Closed Grievances**

Management's reply to a grievance at any step will be considered final, and the grievance closed, if the grievance is not advanced to the next step or written notification to the contrary is not received within fifteen (15) calendar days of the date of such reply.

\* \* \*

**2. RATE PROGRESSION AND PRODUCTION CHART****A. Rate Progression and Production Chart (Keysheet)**

- (1) The Rate Progression and Production Performance Chart (Exhibit A) contained in this 1970 Supplement represents the mutually agreed to revisions of the Rate Progression and Production Performance Chart which was effective November 21, 1966.

**B. Rules for Governing Rate Progression**

- (1) The hourly rate of an employee assigned to a regular job increases according to the Rate Progression and Production Performance Chart (Exhibit A).
- (2) Hourly paid employees are herein considered to be divided into two general categories:
  - (a) **Measured Operators**—Those operators whose performance can be measured by their production efforts.



- (b) **Unmeasured Employees**—Those employees whose work is such that their level of performance must be measured against tasks established by Management.
- (3) The following applies to measured operators referred to in Paragraph (2) (a) above:
  - (a) **Hiring Rate**—All such operators will be hired at the starting rate.
  - (b) **Rate Progression**—Rates progress from hiring rate through the successive steps in accordance with the Rate Progression and Production Performance Chart (Exhibit A).
  - (c) **Advancement**—After the first four (4) weeks of employment, the employee's rate will be increased to the first step if performing at the required production level.
    - (1) If the regular assignment is to a job in Labor Grade 1, the rate increases to the second step at the start of the seventh week of service if the performance on that job has averaged the production required in the first production step (for either automatic machine operation or manual operation) for the preceding two weeks.
    - (2) If the regular assignment is to a job in Labor Grade 2, the rate increases to the second step at the start of the seventh week of service if the performance on that job has averaged the production required in the first production step (for either automatic machine operation or manual operation) for the preceding two weeks.
    - (3) If the regular assignment is to a job in Labor Grade 3, the rate increases to the second step at the start of the seventh week of service if the performance on that job has averaged the production required in the first production step (for either automatic machine operation or manual operation) for the preceding two weeks.
    - (4) If the regular assignment is to a job in Labor Grade 4, the rate increases to the second step at the start of the seventh week of service if the performance on that job has averaged the production required in the first production step (for either automatic machine operation or manual operation) for the preceding two weeks.
  - (d) **Penalties**
    - 1. An operator advancing upward through the rate range of any job who fails to attain, through performance, the next higher rate but who shows promise of becoming satisfactory may be given an extension of a second two-week period at the same rate. If, at the end of that time, the desired level has not been attained, the disposition of the employee involved will be discussed with the local steward.
    - 2. An operator who has attained a given rate through performance and whose productivity drops below the

required level for a two-week period will be warned, and if this same condition applies for a second two-week period, the disposition of the employee involved will be discussed with the local steward.

- (4) The following applies to unmeasured employees referred to in Paragraph (2) (b) above;

- (a) All unmeasured employees on jobs in Labor Grades 1 through 4, will follow the procedure outlined for measured operators, except that their rate of progression and advancement will be based entirely upon satisfactory performance in their assignment.
- (b) All other unmeasured employees will be hired at the minimum of the rate range of their job and will advance according to the Rate Progression and Production Performance Chart depending upon their performance.

(c) Penalty

- 1. An employee advancing upward through the rate range of any unmeasured job who fails to justify through performance the next higher rate, but still shows promise of such attainment may be given an extension not to exceed the time period of the step he is presently in. If at the end of that time the desired performance has not been attained, the disposition of the employee will be discussed with the local steward.
- (5) All rate changes shall become effective on a Monday. These rates that would normally fall within the work week shall become effective the Monday following such date.

3. This AGREEMENT including this SUPPLEMENT I, shall become binding upon the parties upon its execution by representatives of the Company, the Union and the Local Union.

Dated and signed March 16, 1970, effective as of March 16, 1970.

\* \* \*

**EXHIBIT A**  
**WESTINGHOUSE ELECTRIC CORPORATION**  
**INCANDESCENT LAMP DIVISION**  
**LITTLE ROCK, ARKANSAS**  
**RATE PROGRESSION & PRODUCTION PERFORMANCE CHART**  
**Effective January 5, 1970**

Labor Grade	Hourly Rate Range	Minimum Pay Periods to be Served	Starting Rate	1st Step	2nd Step	3rd Step	4th Step	5th Step	6th Step	7th Step
1	\$2.195 - 2.255 Prod. Required Machine and Hand	1st Step —4 Other Steps—2	2.195	*2.225 1st Prod. Step	*2.255 2nd Prod. Step					
2	\$2.195 - 2.325 Prod. Required Machine and Hand	1st Step —4 Other Steps—2	2.195	*2.225 1st Prod. Step	*2.265 2nd Prod. Step	*2.325 3rd Prod. Step				
3	\$2.195 - 2.410 Prod. Required Machine and Hand	1st Step —4 Other Steps—2	2.195	*2.225 1st Prod. Step	*2.265 2nd Prod. Step	*2.305 3rd Prod. Step	*2.345 4th Prod. Step	*2.410 5th Prod. Step		
4	\$2.200 - 2.495 Prod. Required Machine and Hand	1st Step —4 Other Steps—2	2.200	*2.240 1st Prod. Step	*2.290 2nd Prod. Step	*2.340 3rd Prod. Step	*2.400 4th Prod. Step	*2.495 5th Prod. Step		
5	\$2.220 - 2.590	4 Weeks	2.220	2.250	2.300	2.350	2.400	2.495	2.590	
6	\$2.260 - 2.690	6 Weeks	2.260	2.310	2.360	2.410	2.465	2.520	2.600	2.690
7	\$2.320 - 2.800	6 Weeks	2.320	2.370	2.420	2.475	2.530	2.605	2.700	2.800

\*Point where Production Standards Apply.

Labor Grade	Hourly Rate Range	Hiring Rate	2 Mos.	4 Mos.	6 Mos.	9 Mos.	12 Mos.	15 Mos.	18 Mos.	21 Mos.	24 Mos.	27 Mos.	30 Mos.	33 Mos.	36 Mos.
8	\$2.385 - 2.915	2.385	2.425	2.480	2.545	2.605	2.680	2.755	2.830	2.915					
9	2.405 - 3.035	2.405	2.445	2.500	2.565	2.625	2.700	2.775	2.860	2.945	3.035				
10	2.420 - 3.165	2.420	2.485	2.545	2.620	2.695	2.770	2.865	2.960	3.055	3.165				
11	2.495 - 3.355	2.495	2.570	2.645	2.730	2.815	2.900	2.980	3.070	3.160	3.260	3.355			
12	2.585 - 3.560	2.585	2.660	2.735	2.820	2.905	2.990	3.075	3.160	3.255	3.350	3.445	3.560		
13	2.665 - 3.770	2.665	2.740	2.815	2.900	2.985	3.070	3.155	3.240	3.335	3.430	3.525	3.640	3.710	3.770
14	2.760 - 3.990	2.760	2.830	2.905	2.990	3.075	3.160	3.245	3.330	3.430	3.520	3.620	3.735	3.800	3.860
15	2.860 - 4.230	2.860	2.935	3.010	3.105	3.190	3.275	3.360	3.445	3.540	3.635	3.730	3.850	3.910	3.975

Merit to 3.990  
 Merit to 3.975  
 Merit to 4.230

# Agreement

Between

Westinghouse Electric Corporation  
Lamp Division

of

Little Rock, Arkansas

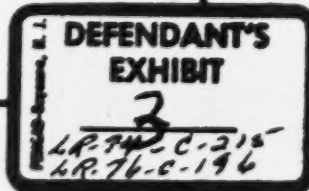
and

International Brotherhood of  
Electrical Workers, AFL-CIO,  
Local Union No. 1136

Little Rock, Arkansas

Effective June 11, 1973

1



### 3.7 Failure to Qualify

An employee, who fails to fulfill the requirements of the job, shall be returned to his former job at his former job rate. The Steward will be notified of the employee's failure to qualify before he is returned to his former job. The incumbent on the original employee's former job shall be returned to his former job at his former rate.

This procedure will continue until all employees affected by the original move have been reinstated in their former jobs. The new job will then be considered open again, but the employee who failed to qualify for it will not be considered to fill that opening. However, if additional education or training has been obtained, the employee may be considered at another time, provided this additional education or training qualifies him to perform the job.

\* \* \*

NAME - LAST, FIRST, MIDDLE		INITIAL	SEX	SECTION	CL. NO.	HIRE DATE	SALARY
Vaughn			M	0111	3600	1-1-79	
PLANT, DIST. & LOCATION				COUNCIL ACCT. - BUDGET - PRIMARY DIST.		EFFECTIVE DATE	
11 Little Rock				08 400 00		1-1-79	
OR POSITION - NAME				NUMBER	EST. HRS.	DATE RANGE SALARY	
Packaging Operator Sleaving				37.50			
DATE	TIME	DEPT.	CL. NO.	ST. NO.	D.W.	ST. SHEET RATE	EXTRA FOR
1-1-79	08:00	3	3				CL. L.R. W.C.
				HIRE	WAGE	ADJUST	AUTHORITY
							184 (5.400)
1. EMPLOYMENT - POWERED EMPLOYEE				YES <input type="checkbox"/> NO <input type="checkbox"/>			
2. SOCIAL SECURITY - NO. 432-74-6861				BIRTH DATE 5-10-50			
3. CHANGE IN RATE				HIRE OR SAL. RATE (100)			
4. CH. GRANT ESTABLISHED HOURS				HIRE (100)			
5. LEAVE OF ABSENCE - FROM				TO			
6. REASON FOR LEAVE - DATE (100)							
7. OTHER							
8. CHANGE IN JOB				HAS PHYSICAL EXAMINATION REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB? (100) YES <input type="checkbox"/> NO <input type="checkbox"/>			
9. OTHER							
10. TRANSFER				REASON FOR TRANSFER YES <input type="checkbox"/> NO <input type="checkbox"/>			
11. SEPARATION - LAST DAY WORKED (100)				UNION CODE REPRESENTATION (100)			
12. QUIT WITH NOTICE				13. RELEASE			
14. QUIT WITHOUT NOTICE				15. DISCHARGE			
16. HAS NOT REPORTED FOR WORK				17. RETIRE			
18. LAYOFF				19. DECEASED			
20. W.C. RATE				21. DATE			
22. STATE				23. ZIP CODE			
24. CITY				25. STATE CODE			
26. ADDRESS - STREET				27. CITY			
28. STATE				29. ZIP CODE			
30. STATE CODE				31. ZIP CODE			
32. ADDRESS - STREET				33. CITY			
34. STATE				35. ZIP CODE			
36. STATE CODE				37. ZIP CODE			
38. ADDRESS - STREET				39. CITY			
40. STATE				41. ZIP CODE			
42. STATE CODE				43. ZIP CODE			
44. ADDRESS - STREET				45. CITY			
46. STATE				47. ZIP CODE			
48. STATE CODE				49. ZIP CODE			
50. ADDRESS - STREET				51. CITY			
52. STATE				53. ZIP CODE			
54. STATE CODE				55. ZIP CODE			
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58. STATE				59. ZIP CODE			
60. STATE CODE				61. ZIP CODE			
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84. STATE CODE				85. ZIP CODE			
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NAME - LAST, FIRST, MIDDLE		INITIAL		SER. ORG.		MICRON SER.		CE. NO. OR SER.		HIST. OR SER.		SAL. OR SER.	
Vaughn C		-		F		0111		3600					
DIV., DIST., DEPT. & LOCATION (SEE)				CONTROL ACCT. - BUDGET - PRIMARY (SEE)				EFFECTIVE DATE (SEE)					
11 Little Rock				08 400 00				1 6-22-77					
OCC. OR POSITION - NAME				NUMBER		ESTAB. H.O. OR		RATE RANGE		ALAB. OR			
Utility Operator SIG						37.50							
LABOR CODE OR CODE (SEE)		JOB NO. OR		GR. NO.		SHIFT (SEE)		STD. T. OR		DLY.		NET SHEET RATE	
4		422		3		x							
EXTRA FOR		HIST.		WGT.		NATL.		AUTHORIZED RATE (SEE)					
CA. LDR.		W.C.		x		184		(4.795T)					
1 EMPLOYMENT - FORMER OR EMPLOYEE YES <input type="checkbox"/> NO <input type="checkbox"/> C.U.L. INC. 12-12-77 5.0057 2 BIRTH DATE 432-94-6861 6-10-50 GEN. INC. 7-10-78 5.2557 3 CHANGE IN RATE (SEE) HPS. OF SAL. RE RATE (137) C.O.M. INC. 12-11-78 5.4857 4 CHANGE IN ESTABLISHED HOURS TO 5 LEAVE OF ABSENCE - FROM 6 RETURNED FROM LEAVE - DATE (138) 7 OF SERVICE 8 CHANGING JOB OR POSITION 9 TRANSFER WAS PHYSICAL EXAMINATION REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION. BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/> 10 TO 11 SEPARATION - LAST DAY WORKED (139) UNION CODE REPRESENTATION (140) RACE (141) 1 12 QUIT WITH NOTICE <input type="checkbox"/> RELEASE <input type="checkbox"/> 13 QUIT WITHOUT NOTICE <input type="checkbox"/> DISCHARGE <input type="checkbox"/> 14 HAS NOT RECEIVED FOR WORK <input type="checkbox"/> RETIRED INC. RATE (142) DIFF. RATE (143) 15 LATEFF <input type="checkbox"/> DECEASED <input type="checkbox"/>													
HOME ADDRESS - STREET (151) CITY (152) STATE (153) ZIP CODE (154) STATE CODE (155) DIV., DIST., DEPT. & LOCATION ACTION CHECK CONTROL ACCT. - BUDGET - PRIMARY 11 Little Rock 0111 3600 08 400 00 1 OCC. OR POSITION - NAME NUMBER LABOR CODE OR CODE JOB NO. GR. NO. SHIFT STD. T. DLY. Utility Operator SIG 4 422 3 x LAST INCREASE - PROMOTION OR MERIT RATE (144) EXTRA FOR HIST. WGT. NATL. AUTH. RATE 4.710 x 184 REMARKS *FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY. REG. AIR. DATE (145) REG. OUT FOR RES. VAC. AFTER FOR RES. VAC. TAKEN (146) 7-13-70 RETROACTIVE Rate increase to top rate.													
EXEMPTION STATUS EXEC. OR SUPV. <input type="checkbox"/> ADMIN. <input type="checkbox"/> MFG. <input type="checkbox"/> OUTSIDE SALESMAN <input type="checkbox"/> WAGE & HOUR LAW EXEMPTION INDUSTRIAL RELATIONS DATE 7-26-77 DATE 7-26-77													
AUTHORIZATION FOR CHANGE IN PAYROLL PWT FORM 36-15 INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2													



NAME (LAST, FIRST, MIDDLE)		INITIAL		SER. NO. / SECTION / CODE		CE. NO. / GRADE		HIRE DATE / SALARY	
Vaughn C		-		F 0111		3600		H	
DIV., DIST., DEPT. & LOCATION (E.G.)				CONTROL ACCT. - BUDGET - PRIMARY (E.G.)				EFFECTIVE DATE (E.G.)	
11 Little Rock				03 400 00				1 6-13-77	
OCC. OR POSITION - NAME				NUMBER		ESTAB. HRS. (E.G.)		RATE RANGE / SALARY (E.G.)	
Utility Operator - SIG				37.50					
LABOR GRADE OR CODE (E.G.)		JOB NO. (E.G.)		GR. NO. / SHIFT (E.G.)		STD. L. / D.W. / KEY SHEET RATE		EXTRA FOR (E.G.)	
4		422		3		X		X 184 4.460	
EMPLOYMENT - FORMER (YES) EMPLOYEE (YES) <input type="checkbox"/> NO <input type="checkbox"/>				BIRTH DATE (E.G.)				GEN. INC. 7-11-77 4.710	
432-94-6861				6-10-50					
CHANGE IN RATE (E.G.)				HRS. OR SAL. (E.G.)					
CHANGE IN ESTABLISHED HOURS (E.G.)				LEAVE OF ABSENCE - FROM (E.G.)					
RETURNED FROM LEAVE - DATE (E.G.)				OR FUTURE (E.G.)					
CHANGE IN JOB OR POSITION (E.G.)				HAS PHYSICAL EXAMINATION REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION. BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/>					
TO: Active Roll from Disability									
SEPARATION - LAST DAY WORKED (E.G.)				UNION CODE REPRESENTATION (E.G.)				RATE (E.G.) 1	
QUIT WITH NOTICE				RELEASE					
QUIT WITHOUT NOTICE				DISCHARGE					
HAS NOT REPORTED FOR WORK				RETIRED - INC. RATE (E.G.)				DIFF. RATE (E.G.)	
LAYOFF				DECEASED					
HOME ADDRESS - STREET & ST. / CITY & ST. / ZIP CODE (E.G.)				STATE CODE (E.G.)					
1801 Johnson Street, Little Rock AR				72204 11					
DIV., DIST., DEPT. & LOCATION				SECTION		CHECK		CONTROL ACCT. - BUDGET - PRIMARY	
OCC. OR POSITION - NAME				NUMBER		LABOR GRADE OR CODE		JOB NO. / GR. NO. / SHIFT / STD. L. / D.W.	
LAST PRE-LEASE - PROHIBITION OR MERIT				DATE		EXTRA FOR (E.G.)		HIRE DATE / WEL. / AUTH. /	
FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.				VAC. DATE FOR (E.G.)		VAC. AFTER (E.G.)		VAC. TAKEN (E.G.)	
7-13-77									
Transferred to the Active Roll from Disability.									
EXPLANATION STATUS				INDUSTRIAL RELATIONS / SUPERVISOR / EMPLOYEE - 2					
H.C. / O.S. / ADJ. / PRO. / OUTSIDE SALESMAN				DATE					
6-14-77									
J.R. Boyer 6-14-77									

AUTHORIZATION FOR CHANGE IN PAYROLL  
(E.G.) FOR A 26735

INDUSTRIAL RELATIONS / SUPERVISOR / EMPLOYEE - 2

NAME: LAST (001)		STREET		INITIAL		SEX (006)	SECTION (007)	GR. NO. (008)	WULT. (009)	SALARY (000)	
Vaccina						M	GL12	3600			
DIV., DEPT., SHIFT & LOCATION (002)						CONTROL ACCT. - BUDGET - PRIMARY (011)			EFFECTIVE DATE (010)		
11 Little Rock									1-12-77		
NCE, OR POSITION - NAME						NUMBER		ESTAB. NO. (013)		RATE RANGE (SALARY) (003)	
LABOR GRADE OR CODE (012)		GR. NO. (015)	SHIFT (016)	STD. T. (017)	D.W. (018)	EST. GROSS RATE		EXTRA FOR (019)	WULT. (020)	WULT. (021)	
NATURE OF ACTION		EMPLOYMENT - FORBER (W) EMPLOYE (003)				YES <input type="checkbox"/> NO <input type="checkbox"/>	BIRTH (017)		DATE (018)		
		*12 # 432-24-6461					5-10-50				
		CHANGE IN RATE (106)									
		CHANGE IN ESTABLISHED HOURS SEPARATE (107)									
		LEAVE OF ABSENCE - FROM (108) TO (109)									
		ON RESUME (110)									
		CHANGE IN JOB OR POSITION (019)				HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION.					
		TRANSFER (019)				FROM (019) TO (019)					
		Disability Roll									
		SEPARATION - LAST DAY WORKED (114)				UNION CODE REPRESENTATION (014)		BACE (115)		1	
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Vaughn				C		F		0111		3600		1			
D.P., DIST., DEPT. & LOCATION (981)				CONTROL ACT. - BUDGET - PRIMARY (911)				EFFECTIVE DATE (912)				1-28-77			
11 Little Rock				03 420 00				1							
OCC. OR POSITION - NAME				NUMBER		ESTD. NO. (918)		RATE		GRADE (SALARY) (929)					
Utility Operator - SIG						37.50									
CLASS. (913)		JOB NO. (914)		GR. NO. (915)		SHIFT (916)		ST. Y. (917)		D. W. (918)		SET SHEET RATE			
(1) 422		3										X			
												194 4.460			
EMPLOYMENT - FORMER (W) EMPLOYEE YES <input type="checkbox"/> NO <input type="checkbox"/>				BIRTH (917)				6-10-50							
SSN # 432-94-6861				DATE											
CHANGE IN RATE (128)				HRS OR SAL.											
CHANGE IN ESTABLISHED HOUR RATE (127)															
LEAVE OF ABSENCE - FROM				TO											
RETURNED FROM LEAVE DATE (129)															
ON SENSITIVE															
CHANGE IN JOB OR POSITION (913)				SEE PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PHYSICAL EXAMINATION, (913)											
TRANSFERED				YEAR WISE. YES ( ) NO ( )											
TO															
SEPARATION - LAST DAY WORKED (134)				UNION CODE REPRESENTATION (914)				PAGE 1							
(134) ( ) ( ) QUIT WITH NOTICE				( ) ( ) RELEASE											
( ) ( ) QUIT WITHOUT NOTICE				( ) ( ) DISCHARGE											
( ) ( ) WAS NOT REPORTED FOR WORK				( ) ( ) RETIRED				INC. RATE (931)				DIFF. RATE (932)			
( ) ( ) LAYOFF				( ) ( ) DECEASED											
NAME & ADDRESS - STREET (137)				CITY (138)				STATE (139)				ZIP CODE (140)			
STATE CODE (141)															
D.P., DIST., DEPT. & LOCATION				SECTION				CHECK		CONTROL ACT. - BUDGET - PRIMARY					
11 Little Rock				0111				3600		06 400 00 1					
OCC. OR POSITION - NAME				NUMBER		LAST GRADE OR CODE		JOB NO.		GR. NO.		SHIFT			
Packaging Operator - Sleeve				3		328		3		3		X			
LAST INCREASE - PROMOTION OR WELTH				DATE (142)		EXTRA FOR		HRLY.		WELTH.		STMTL			
DATE				AMOUNT		4.4600		X		194		4.460			
FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.															
D.P., DIST., DEPT. (143)				SEC. (985)				EXT. (987)				VAC. TAKEN (947)			
7-13-72															
Trans. by Bid #77-60. Date to be reviewed in two weeks & adjusted in accordance with job performance.															
EXEMPTION STATUS															
EXEM. FROM: <input type="checkbox"/> ADVERSE <input type="checkbox"/> PROF. <input type="checkbox"/> OUTSIDE <input type="checkbox"/>				REASON: <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>											
NAME & ADDRESS LAST EXEMPTION				INDUSTRIAL RELATIONS				DATE							
J.R. Boya 3 25 77															
DATE				3 25 77											
This copy shall be forwarded directly to Payroll source in SEPARATIONS, EMPLOYMENT & DISABILITY. It will be returned to point of origin as evidence of official action. In case of Transfer to another Payroll source or to Disability Roll also prepare Form 33548 (Pink).															
AUTHORIZATION FOR CHANGE IN PAYROLL (W) FORM 3475S															
INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE - 3															



NAME - LAST FIRST		INITIAL		SEX	SECTION	CK. NO.	MR. SALARY
Vaughn C		-		F	0111	3600	11
OFF. DIST. & LOCATION				CONTROL ACCT. - BUDGET - PRIMARY		EFFECTIVE DATE	
11 Little Rock				08 400 00		1 4-29-74	
OCC. OR POSITION - NAME				NUMBER		RATE RANGE (SALARY)	
Packaging Operator - Steeving				37.50			
LATO. GRADE OR CODE	JOB NO.	GR. NO.	STO. L.	D.W.	KEY SHEET RATE	EXTRA FOR	MR. WGT. MONTH
3	325	2		X			
EMPLOYMENT - FORAGER (NO EMPLOYEE)				YES <input type="checkbox"/> NO <input type="checkbox"/>		GEN. INC. 3 2 4 74	
BIRTH DATE				6-10-50		3 3 2 0	
CHANGE IN RATE				HRS. OR SAL. RATE (13)			
CHANGE IN ESTABLISHED HOURS				HRS. OR SAL. RATE (13)			
LEAVE OF ABSENCE - FROM				TO			
RECEIVED FROM LEAVE - DATE (13)				OR REUSE			
CHANGE IN JOB OR POSITION				HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION			
TRANS IN				BEEN MADE YES <input type="checkbox"/> NO <input type="checkbox"/>			
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138 <input type="checkbox"/> 139 <input type="checkbox"/> 140 <input type="checkbox"/> 141 <input type="checkbox"/> 142 <input type="checkbox"/> 143 <input type="checkbox"/> 144 <input type="checkbox"/> 145 <input type="checkbox"/> 146 <input type="checkbox"/> 147 <input type="checkbox"/> 148 <input type="checkbox"/> 149 <input type="checkbox"/> 150 <input type="checkbox"/> 151 <input type="checkbox"/> 152 <input type="checkbox"/> 153 <input type="checkbox"/> 154 <input type="checkbox"/> 155 <input type="checkbox"/> 156 <input type="checkbox"/> 157 <input type="checkbox"/> 158 <input type="checkbox"/> 159 <input type="checkbox"/> 160 <input type="checkbox"/> 161 <input type="checkbox"/> 162 <input type="checkbox"/> 163 <input type="checkbox"/> 164 <input type="checkbox"/> 165 <input type="checkbox"/> 166 <input type="checkbox"/> 167 <input type="checkbox"/> 168 <input type="checkbox"/> 169 <input type="checkbox"/> 170 <input type="checkbox"/> 171 <input type="checkbox"/> 172 <input 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NAME LAST FIRST		INITIAL		SEC. 009 SECTION 0011 JOB NO. 003		HIRE & SALARY	
Vaughn C				F 0111 3959		H	
DIV., DIST., DEPT. & LOCATION				CONTROL ACCT. - BUDGET - PRIMARY 011		EFFECTIVE DATE 019	
11 Little Rock				08 400 00		3/26/73	
JOB OR POSITION - NAME				NUMBER		ESTAB. HRS. 019	
Packaging Operator - Sleeving				37.50			
LABOR GRADE OR CODE 013		JOB NO. 019		GL NO. 019		SHIFT 019	
3		328		3		X	
STDL. 019		D.W. 019		KEY SHEET RATE		EXTRA FOR	
3		X				GL LDR. 019	
DATE 019		BIRTH DATE 019		DATE 019		DATE 019	
3/26/73		6/10/50		6/10/50		3/26/73	
EMPLOYMENT - FORMER TWO EMPLOYE YES <input type="checkbox"/> NO <input type="checkbox"/> 001				DATE 019 6/10/50			
CHANGE IN RATE 1136				DATE 019 6/10/50			
CHANGE IN ESTABLISHED HOURS YES <input type="checkbox"/> NO <input type="checkbox"/> 001				DATE 019 6/10/50			
LEAVE OF ABSENCE - FROM TO				DATE 019 6/10/50			
RETURNED FROM LEAVE - DATE 1139				DATE 019 6/10/50			
OR RE-RE				DATE 019 6/10/50			
CHANGE IN JOB OR POSITION 019				DATE 019 6/10/50			
TRANSFER BEEN MADE YES <input type="checkbox"/> NO <input type="checkbox"/> 001				DATE 019 6/10/50			
TO				DATE 019 6/10/50			
SEPARATION - LAST DAY WORKED 1134				DATE 019 6/10/50			
QUIT WITH NOTICE				DATE 019 6/10/50			
QUIT WITHOUT NOTICE				DATE 019 6/10/50			
HAS NOT REPORTED FOR WORK				DATE 019 6/10/50			
LAYOFF				DATE 019 6/10/50			
UNION CODE REPRESENTATION 018				DATE 019 6/10/50			
STATE CODE 018				DATE 019 6/10/50			
HOME ADDRESS - STREET 017				DATE 019 6/10/50			
CITY 018				DATE 019 6/10/50			
STATE 019				DATE 019 6/10/50			
ZIP CODE 019				DATE 019 6/10/50			
STATE CODE 019				DATE 019 6/10/50			
DIV., DIST., DEPT. & LOCATION				SECTION		CHECK	
11 Little Rock				0111		3959	
JOB OR POSITION - NAME				NUMBER		CONTROL ACCT. - BUDGET - PRIMARY	
Packaging Operator - Sleeving				37.50		08 400 00 1	
LAST INCREASE - PROMOTION OR MERIT		RATE 020		EXTRA FOR		HIRE, WELT, MTHLT	
DATE 019		2.855		GL LDR. 019		W.C. 019	
AMOUNT							
*FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.							
TOT. EMP. DATE 019		VAC. DATE 019		VAC. AFTER 019		VAC. TAKEN 019	
3/26/73							
Late Increase to top pay.							
EMPLOYMENT STATUS							
FREE <input type="checkbox"/> ADMIN <input type="checkbox"/> NOT <input type="checkbox"/> OUTSIDE SALESMAN <input type="checkbox"/>							
DATE OF HOUR IN EMPLOYMENT INDUSTRIAL RELATIONS DATE							
3/24/73							
HIRE OF ACCT.							
3/26/73							
3/26/73							

AUTHORIZATION FOR CHANGE IN PAYROLL  
DATE FOR 3/26/73

INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2





NAME - LAST (56)		FIRST		MIDDLE		SEX (58) - SECTION (59) - CGL NO. (60)		HRS. - SALARY (61)	
Vaughn		C		-		F 111 3959		H	
DIV., DIST., DEPT. & LOCATION (62)						CONTROL ACCT. - BUDGET - PRIMARY (63)			
11 Little Rock						08 400 00 1 2/26/73			
OCC. OR POSITION - NAME						NUMBER		EFFECT. HRS. (64)	
Packaging Operator - Sleeving						37.5		RATE RANGE (SALARY (65))	
LABOR GRADE OR CODE (66)		JOB NO. (67)		CGL NO. (68)		SHIFT (69)		STDL. D.W. (70)	
3		328		3		3		X	
KEY SHEET RATE		EXTRA FOR		HRS. (71)		WELT. (72)		AUTHORITY (73)	
2.815		W.C.		X					
(X) EMPLOYMENT - FORMER (74) EMPLOYEE YES <input type="checkbox"/> NO <input type="checkbox"/> (X) CHANGE IN RATE (75) HRS. OR SAL. RATE (76) 432-94-6861 BIRTH DATE 6/10/50 (X) CHANGE IN ESTABLISHED HOURS (77) HRS. OR SAL. RATE (78) (X) LEAVE OF ABSENCE - FROM TO (X) RETURNED FROM LEAVE - DATE (79) (X) OR REHIRE (X) CHANGE IN JOB OR POSITION (80) { HAS PHYSICAL EXAMINATION REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATIONS. BEEN MADE. YES ( ) NO ( ) } (X) TRANSFER TO (X) SEPARATION - LAST DAY WORKED (81) UNION CODE REPRESENTATION (82) RACE (83) 1 (X) (84) (85) QUIT WITH NOTICE (86) (87) RELEASE (X) (88) QUIT WITHOUT NOTICE (89) (90) DISCHARGE (X) (91) HAS NOT REPORTED FOR WORK (92) (93) RETIRED (94) (95) RATE (96) DIFF. RATE (97) 673 (X) (98) LAYOFF (99) (100) DECEASED									
HOME & ADDRESS - STREET (101) CITY (102) STATE (103) ZIP CODE (104) STATE CODE (105)									
DIV., DIST., DEPT. & LOCATION SECTION CHECK CONTROL ACCT. - BUDGET - PRIMARY 11 Little Rock 111 3959 08 400 00 1 OCC. OR POSITION - NAME NUMBER LABOR GRADE OR CODE JOB NO. CGL NO. SHIFT STDL. D.W. Packaging Operator - Sleeving 3 328 3 X LAST R. GRADE - PROMOTION OR MERIT RATE (106) EXTRA FOR HRS. (107) WELT. (108) AUTH. (109) 2.765 W.C. X									
* IN OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY. TOT. EMP. DATE (110) VAC. DUE FOR (111) VAC. AFTER (112) VAC. TAKEN (113)									
Rate Increase. Rate to be reviewed in two weeks and adjusted in accord with job performance.									
SEPARATION STATUS (114) (115) (116) (117) (118) (119) (120) (121) (122) (123) (124) (125) (126) (127) (128) (129) (130) (131) (132) (133) (134) (135) (136) (137) (138) (139) (140) (141) (142) (143) (144) (145) (146) (147) (148) (149) (150) (151) (152) (153) (154) (155) (156) (157) (158) (159) (160) (161) (162) (163) (164) (165) (166) (167) (168) (169) (170) (171) (172) (173) (174) (175) (176) (177) (178) (179) (180) (181) (182) (183) (184) (185) (186) (187) (188) (189) (190) (191) (192) (193) (194) (195) (196) (197) (198) (199) (200) (201) (202) (203) (204) (205) (206) (207) (208) (209) (210) (211) (212) (213) (214) (215) (216) (217) (218) (219) (220) (221) (222) (223) (224) (225) (226) (227) (228) (229) (230) (231) (232) (233) (234) (235) (236) (237) (238) (239) (240) (241) (242) (243) (244) (245) (246) (247) (248) (249) (250) (251) (252) (253) (254) (255) (256) (257) (258) (259) (260) (261) (262) (263) (264) (265) (266) (267) (268) (269) (270) (271) (272) (273) (274) (275) (276) 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AUTHORIZATION FOR CHANGE IN PAYROLL (1001) INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2 (1002)									

NAME LAST FIRST		LAST		MIDDLE		SECTION		CHECK		CONTROL ACCT. - BUDGET - PAYMENT		EFFECTIVE DATE	
Vaughn		C		-		F		111		3959		H	
DIV., DIST., DEPT. & LOCATION (001)						CONTROL ACCT. - BUDGET - PAYMENT (01)						EFFECTIVE DATE	
11 Little Rock						08 400 00						1 12/28/73	
C.C. OR POSITION NAME						NUMBER		ESTAB. HRS.		RATE		BUDGET SALARY (03)	
Packaging Operator- Slewing						37.5							
LIVER GRADE		JOB NO.		GR. NO.		STD. L.		D.W.		KEY SHEET RATE		EXTRA FOR	
0 000-412		328		3		X						2.765	
EMPLOYMENT - FORMER (N) EMPLOYEE YES <input type="checkbox"/> NO <input type="checkbox"/> DATE 432-94-6861 BIRTH DATE 6/10/50 CHANGE IN RATE (134) _____ HRS. OR SAL. _____ CHANGE IN ESTABLISHED HOURS _____ LEAVE OF ABSENCE - FROM _____ TO _____ RETURNED (FROM LEAVE) DATE (135) _____ OF REUSE _____ (X) CHANGE IN JOB OR POSITION _____ TRANSFER _____ TO _____ HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF YES, OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/> UNION CODE REPRESENTATION (014) _____ PAGE 1 136 <input type="checkbox"/> QUIT WITH NOTICE <input type="checkbox"/> RELEASE 137 <input type="checkbox"/> QUIT WITHOUT NOTICE <input type="checkbox"/> DISCHARGE 138 <input type="checkbox"/> HAS NOT REPORTED FOR WORK <input type="checkbox"/> RETIRED INC. RATE (020) _____ OFF. RATE (021) _____ 139 <input type="checkbox"/> LAYOFF <input type="checkbox"/> DECEASED													
HOME ADDRESS-STREET (007) CITY (008) STATE (009) ZIP CODE (010) STATE CODE (011)													
DIV., DIST., DEPT. & LOCATION SECTION CHECK CONTROL ACCT. - BUDGET - PAYMENT 11 Little Rock 111 3959 08 400 00 1 C.C. OR POSITION NAME NUMBER LABOR GRADE JOB NO. GR. NO. SHIFT STD. L. D.W. Bulb Loader- Hand 1 101 3 X LAST INCREASE - PROMOTION OR AWARD RATE (02) EXTRA FOR HRS. WGT. MTHS. DATE AMOUNT 2.765 GR. LDR. H.C. X FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY TOT. EMP. DATE (016) VAC. DUE EDT (005) VAC. AFTER EDT (006) VAC. TAKEN (007) 2-13-70 Trans. by Request #73-26. Rate to be reviewed in two weeks & adjusted in accord with job performance.													
EXEMPTION STATUS SINC. <input type="checkbox"/> ADMN. <input type="checkbox"/> PRET. <input type="checkbox"/> OUTSIDE SALESMAN <input type="checkbox"/> 1/2 H. HOUR LAW EXEMPTION (INDUSTRIAL RELATIONS) DATE 2/5/73 A.G. OF VAC. 2/5/73 2/5/73													
AUTHORIZATION FOR CHANGE IN PAYROLL INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2 (N) FORM 3673													

NAME LAST FIRST		MIDDLE		SEX	SECTION	CONTROL ACCT. - BUDGET - PRIMARY	HIRE DATE	SALARY
Vaughn C				F	111	5000	3950	EDW
CITY, DIST., DEPT. & LOCATION					CONTROL ACCT. - BUDGET - PRIMARY		EFFECTIVE DATE	
11 Little Rock					08 400 00		1/15/73	
COC. OR POSITION - NAME					NUMBER	ESTAB. HRS.	RATE RANGE (SALARY)	
Bulb Loader- Hand						37.5		
LABOR GRADE OR CODE	JOB NO.	GR. NO.	SHIFT	STD. L.	D.W.	KEY	SHIFT RATE	EXTRA FOR
1	101		3		X			
						GR. LDR.	W.C.	HIRE DATE
								2.765T
EMPLOYMENT - FORMER TWO EMPLOYEE YES <input type="checkbox"/> NO <input type="checkbox"/> HIRE DATE 432-94-6861 BIRTH DATE 6/10/50 CHANGE IN RATE (1130) _____ CHANGE IN ESTABLISHED HOURS HRS. OR SAL. (1137) _____ LEAVE OF ABSENCE - FROM _____ TO _____ RETURNED FROM LEAVE - DATE (1135) _____ OR RESUME _____ CHANGE IN JOB OR POSITION (1139) _____ TRANSFER (1140) _____ TO _____ SEPARATION - LAST DAY WORKED (1138) _____ UNION CODE REPRESENTATION (1141) _____ RACE (1139) 1 QUIT WITH NOTICE (1142) _____ DISCHARGE (1143) _____ QUIT WITHOUT NOTICE (1144) _____ DISCHARGE (1145) _____ HAS NOT REPORTED FOR WORK (1146) _____ RETIRED (1147) _____ LAYOFF (1148) _____ DECEASED (1149) _____								
HO. AL. A. JONES - STREET (1031) CITY (1030) STATE (1032) ZIP CODE (1040) STATE CODE (1033)								
CITY, DIST., DEPT. & LOCATION					SECTION	CHECK	CONTROL ACCT. - BUDGET - PRIMARY	
11 Little Rock					111	5000	08 400 00	
COC. OR POSITION - NAME					NUMBER	LABOR GRADE OR CODE	JOB NO.	GR. NO.
Bulb Loader- Hand						1	101	
LAST RISE - PROMOTION OR MERIT					RATE (1130)	EXTRA FOR	HIRE DATE	W.C.
					2.765T			X
REMARKS Change in Clock Number.								
AUTHORIZATION FOR CHANGE IN PAYROLL AUTH. DATE 11/14/73								

INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE - 2

44-11: LAST 1044		FIRST		INITIAL		SEE EGS: SECTION 007		CL. NO. 002		HRLT. SALARY	
Vaughn		:		-		F 111		5000		H	
TRV. DIST. DEPT. & LOCATION (001)						CONTROL ACCT. BUDGET - PRIMA				EFFECTIVE DATE (019)	
11 Little Rock						08 400 00				1 11/6/72	
OCC. OR POSITION - NAME						NUMBER		EST. AB. HRS.		RATE RANGE / SALARY (020)	
Bulb Loader- Hand						37.5					
LABOR GRADE OR CODE (012)		JOB NO. (013)		SHIFT (014)		STD. T. (015)		DLY. (016)		KEY SHEET RATE	
1		101		3		X					
								EXTRA FOR GR. LDR. W.C.		HRLT. WRLT. MTHLY AUTHORIZED RATE (020)	
										X 2.685	
EMPLOYMENT - FOR NEW EMPLOYEE YES <input type="checkbox"/> NO <input type="checkbox"/> 432-94-6861 BIRTH DATE 6/10/50 CHANGE IN RATE (118) HRS. OR SAL. RE RATE (119) CHANGE IN ESTABLISHED HOURS LEAVE OF ABSENCE FROM TO RETURNED FROM LEAVE - DATE (119) OR RE-EMP CHANGE IN JOB OR POSITION (113) TRANSFER { HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/>											
SEPARATION - LAST DAY WORKED (134) UNION CODE REPRESENTATION (016) RACE (115) 1 (135) 1 QUIT WITH NOTICE 1 RELEASE 1 QUIT WITHOUT NOTICE 1 DISCHARGE 1 WAS NOT REPORTED FOR WORK 1 RETIRED INC. RATE (021) DIFF. RATE (022) 1 LAYOFF 1 DECEASED											
HOME ADDRESS - STREET & NO.						CITY (016)		STATE (019)		ZIP CODE (040)	
										STATE CODE (015)	
TRV. DIST. DEPT. & LOCATION						SECTION		CHECK		CONTROL ACCT. BUDGET - PRIMA	
11 Little Rock						111		3602		08 400 00 1	
OCC. OR POSITION - NAME						NUMBER		LABOR GRADE OR CODE		JOB NO. GR. NO. SHIFT STD. T. DLY.	
Bulb Loader- Hand								1 101		2 X	
LAST INCREASE - PROMOTION OR MERIT						RATE (023)		EXTRA FOR GR. LDR. W.C.		HRLT. WRLT. MTHLY	
DATE						2.685				X	
*FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY. TOT. EMP. DATE (016) VAC. DUE EOP (085) VAC. AFTER EOP (086) VAC. TAKEN (087) 7-13-70 Shift change by Request #72-488.											
EXEMPTION STATUS EX. C. <input type="checkbox"/> ADMN. <input type="checkbox"/> PROF. <input type="checkbox"/> OUTSIDE SALESMAN <input type="checkbox"/> WAGE & HOUR (014) REMAISON INDUSTRIAL RELATIONS DATE 6/1/72 11/4/72 MGR. OR SPECTOR DATE S. Johnson 11-6-72											
AUTHORIZATION FOR CHANGE IN PAYROLL INDUSTRIAL RELATIONS / SUPERVISOR / EMPLOYEE - 2											



Bull: Leader - Ward				37.5	
DATE	TIME	STATUS	REASON	REMARKS	AUTHORIZED
12/1/78	12:15	X	CHG. RATE	6-10-50	455
<div> <div> <div>1</div> <div>EMPLOYMENT - FOR A PERIOD OF</div> <div>YES <input type="checkbox"/> NO <input type="checkbox"/></div> </div> <div> <div>2</div> <div>CHG. IN RATE</div> <div>YES <input type="checkbox"/> NO <input type="checkbox"/></div> </div> </div>					
<div> <div>3</div> <div>CHG. IN ESTABLISHED HOURS</div> <div>HRS. OR SAL. RATE <input type="checkbox"/></div> </div>					
<div> <div>4</div> <div>LEAVE OF ABSENCE FROM</div> <div>TO</div> </div>					
<div> <div>5</div> <div>RETURNED FROM LEAVE DATE</div> <div>OR HOME</div> </div>					
<div> <div>6</div> <div>CHANGE IN JOB OR POSITION</div> <div>HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PHYSICAL EXAMINATION, BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/></div> </div>					
<div> <div>7</div> <div>TRANSFER</div> <div>TO</div> </div>					
<div> <div>8</div> <div>SEPARATION - LAST DAY WORKED</div> <div>12/1/78</div> </div>					
<div> <div>9</div> <div>REASON FOR SEPARATION</div> <div>1. QUIT WITH NOTICE</div> <div>2. QUIT WITHOUT NOTICE</div> <div>3. HAS NOT REPORTED FOR WORK</div> <div>4. LAYOFF</div> <div>5. RELEASE</div> <div>6. DISCHARGE</div> <div>7. RETIRED</div> <div>8. DECEASED</div> </div>					
<div> <div>10</div> <div>DATE</div> <div>12/1/78</div> </div>					

HOME ADDRESS - STREET (057)	CITY (058)	STATE (059)	ZIP CODE (060)	STATE CODE (035)
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PRIOR RECORD	DIV., DIST., DEPT. & LOCATION		SECTION	CHECK	CONTROL, ACCT., BUDGET - PRIMARY				
	11 Little Rock		111	4002	03 400 00				
	JOB OR POSITION - NAME		NUMBER	LABOR GRADE OR CODE	JOB NO.	GR. NO.	SHIFT	STD. T.	D.W.
	Scalex Operator			4	415		3		X
	LAST INCREASE - PROMOTION OR MERIT			DATE		EXTRA FOR			
	DATE		AMOUNT		SELECTION		W.C.		
			2.695T				X		

\*FCR OTHER THAN EMPLOYMENT. COMPLETE ONLY WHEN REQUIRED LOCALLY.

101. 147. 0-7 94

FAC. DUE EDV. 00

YAC AFTER ECT CON

VAC. TAIN 687

Disqualified as Sealix Machine Operator--not eligible to hold this job in future. Placed on Open Job #71-98. Rate to be reviewed in 2 wks. & adjusted if performance is not satisfactory.

☐ EMPLOYED  
☐ OR OFFICE  
☐ ADMIRAL  
☐ PROF.  
☐ OUTSIDE  
☐ SALESMAN  
 WAGE & HOUSELAWEE, PIONEER INDUSTRIAL RELATIONS DATE  
 4-19-71  
 M.R. OF AFRICA DATE

*Administrative reference*  
This copy shall be forwarded directly to the off source for  
SEPARATIONS, EMPLOYMENT and TRANSFERS.

For all other purposes it shall accompany the request. It will be returned to point of origin as evidence of official action. In case of Transfer to another Payroll source or to Disability Roll also enclose form 72548 (Panel 1)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 10-14-2010 BY 60322



NAME: LAST FOL	FIRST	INITIAL	DET CODE	SECTION CODE	CL. NO. CODE	HRV. SALARY CODE
Vaughan	C		F	111	3836	H
J.V. DIST. DEPT. & LOCATION REF:			CONTROL ACCT. BUDGET-REVENUE CODE			EFFECTIVE DATE
11 Little Rock			03 400 00			1 11/16/70
TICC. OR POSITION NAME			NUMBER		ESTAB. FRS.	RATE RANGE SALARY CODE

37.5

Searched				Serialized				37.5			
ANNO GRAD	JOE NO.	GR. NO.	STED.	U.N.	KEY SHEET DATE	EXTRA FOR	HELT.	WELT.	NATHEP	AUTHORIZED	
CA CODE	018	019				GR. LDR	W.C.			RATE	
4	15	2	X					X		2.5452	
1. EMPLOYMENT - FORMER (NY) EMPLOYEE				YES <input type="checkbox"/> NO <input type="checkbox"/>							
DOB				BIRTH (DD)							
435-94-6861				DATE		6/14/50					
X CHANGE IN RATE (13B)				HRS. OR SAL.							
1 CHANGE IN ESTABLISHED HOURS				PERATE (13C)							
1 LEAVE OF ABSENCE - FROM				TO							
1 RETURNED FROM LEAVE - DATE (13D)											
1 OR REUSE											
1 CHANGE IN JOB				{ HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION. BEEN MADE. YES ( ) NO ( ) }		PATROLL USE ONLY					
1 OR POSITION											
1 TRANSFER											
1 TO											
1 SEPARATION - LAST DAY WORKED (13B)				UNION CODE REPRESENTATION (14B)		RATE (13D)					
13B				1 QUIT WITH NOTICE		1 RELEASE					
1 QUIT WITHOUT NOTICE				1 DISCHARGE							
1 WAS NOT REPORTED FOR WORK				1 RETIRED		INC. RATE (12)		DIFF. RATE (12)			
1 LAYOFF				1 DISCHARGED							

HOME ADDRESS-STREET (50)	CITY (50)	STATE (50)	ZIP CODE (60)	STATE CODE (30)
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CHECK RECORD	Div., DIST., DEPT. & LOCATION		SECTION	CHECK	CONTROL ACCT. - BUDGET - PRIMARY				
	11 Little Rock		111	3502	03 400 00		1		
	OCC. OR POSITION - NAME		NUMBER	LABOR GRADE OR CODE	JOB NO.	GL NO.	SHIFT	STD. L.	D.W.
	Sealex Machine Operator			4	415				X
LAST INCREASE - PROMOTION OR MERIT				RATE (DZ)	EXTRA FOR		MILT.	WRLT.	ANNUAL
DATE		AMOUNT		2.450	CAL. DR. W.C.		X		

\*FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.

TDT, EMP, DATE CWS

VAC. DUE 10M 1989

VAC. AFTER 10Y 0-6

VAC. TARDI 057

Transferred to Mr. Brazil's section. Rate Increase to top p.

EXEMPTION STATUS

REC. ☐ ADMMN ☐ PROF. ☐ OUTWTR SALESMAN ☐

DATE & HOUR LAST EXTENSION REC. SET BY RELATIONS DATE

*12/1/78*

MCR. OF ACCT. A DATE

SEPARATIONS, EMPLOYMENT AND TRANSFERS

For all other purposes it shall accompany the original. It will be returned to point of origin as evidence of official action. In case of Transfer to another Payroll source or to Disability will also process Form 2054B (Pub. L.

NAME - LAST, FIRST, MIDDLE Vaughn C V		SEX F	SECTION 111	CL. NO. 3502	HR. L. PM	SALARY 000
DIV., DEPT., & LOCATION 1 Little Rock		CONTROL ACCT. - BUDGET - PRIMARY 03 400 00 1		EFFECTIVE DATE 7/25/70		
OCC. OR POSITION - NAME Dealer Machine Operator		NUMBER 37.5	ESTAB. HRS. 37.5		RATE RANGE - SALARY 000	
LARGE USE OR CODE 415	JOB NO. 415	GR. NO. 2	SHIFT 2	STD. L. X	D.W. X	KEY SHEET RATE 2.340
EMPLOYMENT - FORMER EMPLOYEE YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>		BIRTH DATE 6/10/50		2.340		
CHANGE IN RATE (137)		YES OR SAL.		PATROLL USE ONLY		
CHANGE IN ESTABLISHED HOURS (137)		REBATE (137)				
LEAVE OF ABSENCE - FROM		TO				
RETURNED FROM LEAVE - DATE (137)		OR REBATE				
CHANGE IN JOB OR POSITION (137)		HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/>				
TRANSFER TO						
SEPARATION - LAST DAY WORKED (137)		UNION CODE REPRESENTATION (137)		RATE (137)		
QUIT WITH NOTICE		RELEASE				
QUIT WITHOUT NOTICE		DISCHARGE				
HAS NOT REPORTED FOR WORK		RETIRED		INC. RATE (137) OFF. RATE (137)		
LAYOFF		DECEASED				
HOME ADDRESS - STREET (57) CITY (48) STATE (39) ZIP CODE (46) STATE CODE (39)						
DIV., DEPT., & LOCATION 1 Little Rock		SECTION 111	CHICE 3502	CONTROL ACCT. - BUDGET - PRIMARY 03 400 00 1		
OCC. OR POSITION - NAME Dealer Machine Operator		NUMBER 4	LABOR GRADE OR CODE 415	GR. NO. 2	SHIFT 2	STD. L. X
LAST INCREASE - PROMOTION OR MERIT		RATE (137) 2.340		EXTRA FOR GR. LDR. W.C. %		
FOR OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.						
P.P. EMP. DATE (39) VAC. DUE FOR (39) VAC. AFTER (39) (39) VAC. TAKEN (39)						
REMARKS <u>See Increase. Rate to be reviewed in the wage survey.</u> <u>Adjusted in accord with job performance.</u>						
EXEMPTION STATUS FED. <input type="checkbox"/> STATE <input type="checkbox"/> ADVERSE <input type="checkbox"/> PROF. <input type="checkbox"/> OUTSIDE SALESMAN <input type="checkbox"/> WAGE & HOUR LAW EXEMPTION INDUSTRIAL RELATIONS DATE 7/25/70 DATE OF ACTION 7/25/70						
AUTHORIZATION FOR CHANGE IN PATROLL (W) FORM 3-73						
INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2						

NAME: LAST FIRST		(1957)		MID-SEA		SER. NO.		SEC. NO. (001)		CL. NO. (12)		EMPL. NO. (1)		SA. NO. (1)	
Vaughn		C		-		F		121		3502		M			
DIV., DIST., DEPT. & LOCATION (001)						CONTROL ACCT. - BUDGET - PRIOR. (011)						EFFECTIVE DATE (01)			
11 Little Rock						03 400 00						2/18/71			
OCC. OR POSITION - NAME						NUMBER		ESTAB. NOS.		RATE RANGE		SALARY (00)			

Sealey Machine Operator				37.5	
LATOR GRADE	JOB NO.	GR. NO.	THST	STO. T.	C.D.N.
OR CODE 012	013	014	015	016	017
4	415	2	X		
EMPLOYMENT - FORMER (W) EMPLOYEE			YES <input type="checkbox"/>	NO <input type="checkbox"/>	
BIRTH DATE			6/10/50		
CHANGE IN RATE (130)					
CHANGE IN ESTABLISHED HOURS					
LEAVE OF ABSENCE - FROM			TO		
RETURNED FROM LEAVE - DATE (133)			OR BE HIRE		
CHANGE IN JOB OF POSITION			(H) HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN MADE. YES ( ) NO ( )		
TRANSFER					
TO					
SEPARATION - LAST DAY WORKED (134)			UNION CODE REPRESENTATION: 010		RACE (133)
QUIT WITH NOTICE			RELEASE		
QUIT WITHOUT NOTICE			DISCHARGE		
HAS NOT REPORTED FOR WORK			RETIRE		INC. RATE 021
LAYOFF			DECEASED		OFF. RATE 022

1. CARE ADDRESS - STREET (150)	CITY (50)	STATE (100)	ZIP CODE (100)	STATE CODE (100)
--------------------------------	-----------	-------------	----------------	------------------

PRINTER REQUIRED	DIV., DIST., DEPT. & LOCATION			SECTION	CHECK	CONTROL ACCT. - BUDGET - FINANCIAL				
	11 Little Rock			111	3502	03	400	00	1	
	J.C. OR POSITION - NAME			NUMBER	LABOR GRADE OR CODE	JOB NO.	GR. NO.	SHIFT	STD. L.	D.W.
	Sealex Machine Operator				4	415		2		X
	LAST INCREASE - PROMOTION OR MERIT			RATE STD.	ESTRA JOB		HRLY.	WEEK	ANNU.	
DATE	AMOUNT			2.20	GR. LOW		H.C.			

\*FOR OTHER THAN APPOINTMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.

107. (AMP. 5-11-61)	VAC. DUE ED: 689	VAC. AFTER ED: 690	VAC. TAKEN 687
---------------------	------------------	--------------------	----------------

Rate Increase Rate to be reviewed in two weeks and adjusted in accordance with job performance.

L.C. ☐ ADMSR ☒ PREP. ☐ OUTSIDE ☐  
C.B. ☐ SALES MAN ☐  
N.W.C.B. HOURS AND FREQUENCIES INDUSTRIAL RELATIONS DATE

MA 28.3 ACB 7/1-67

RG 226-1091-17 (1)  
This copy shall be forwarded directly to Payroll source for  
**SEPARATIONS, EMPLOYMENT AND TRANSFERS.**  
For all other purposes it shall accompany the original. It will  
be returned to point of origin at instance of official action.  
In case of transfer to another Payroll source or to this salary  
and wage source Form 1354B (Pub. 1)

AUTHORIZATION FOR CHANGE IN PAYROLL  
NO. 932A 36755

INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2

NAME LAST 006		FIRST		INITIAL		SEC 001	SECTION 001	CA. NO. 001	REL. SALARY
11 Little Rock		C V		F		111	3502		
OCC. OR POSITION - NAME		CONTROL ACCT-BUDGET-PRIMARY 010		EFFECTIVE DATE 010					
Sealex Machine Operator		03 400 00		07 1 177					
LABOR GRADE OR CODE 010		JOB NO.	CA. NO.	SHIFT 010	STD. T.	D.W.	LEY SHEET RATE	EXTRA FOR	REL. WRET. RATHLY
4		415		2					
NATURE OF ACTION		EMPLOYMENT - FORMER EMPLOYEE		YES <input type="checkbox"/> NO <input type="checkbox"/>					
1		CHANGE IN RATE 1130		BIRTH DATE 010		6/10/50			
2		CHANGE IN ESTABLISHED HOURS		HRS. OF SAL. RATE 1137					
3		LEAVE OF ABSENCE - FROM		TO					
4		OR RETURN		DATE 1139					
5		CHANGE IN JOB OR POSITION		HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN MADE. YES <input type="checkbox"/> NO <input type="checkbox"/>					
6		TRANSFER		TO					
7		SEPARATION - LAST DAY WORKED 1138		UNION CODE REPRESENTATION 010		RACE 1139			
8		QUIT WITH NOTICE		1		RELEASE			
9		QUIT WITHOUT NOTICE		1		DISCHARGE			
10		HAS NOT REPORTED FOR WORK		1		RETIRED			
11		LAYOFF		1		DECEASED			
12		N.C. RATE 021		DIFF. RATE 022					
13		LAYOUT		1					
14		N.C. RATE 021		DIFF. RATE 022					
15		LAYOUT		1					
16		N.C. RATE 021		DIFF. RATE 022					
17		LAYOUT		1					
18		N.C. RATE 021		DIFF. RATE 022					
19		LAYOUT		1					
20		N.C. RATE 021		DIFF. RATE 022					
21		LAYOUT		1					
22		N.C. RATE 021		DIFF. RATE 022					
23		LAYOUT		1					
24		N.C. RATE 021		DIFF. RATE 022					
25		LAYOUT		1					
26		N.C. RATE 021		DIFF. RATE 022					
27		LAYOUT		1					
28		N.C. RATE 021		DIFF. RATE 022					
29		LAYOUT		1					
30		N.C. RATE 021		DIFF. RATE 022					
31		LAYOUT		1					
32		N.C. RATE 021		DIFF. RATE 022					
33		LAYOUT		1					
34		N.C. RATE 021		DIFF. RATE 022					
35		LAYOUT		1					
36		N.C. RATE 021		DIFF. RATE 022					
37		LAYOUT		1					
38		N.C. RATE 021		DIFF. RATE 022					
39		LAYOUT		1					
40		N.C. RATE 021		DIFF. RATE 022					
41		LAYOUT		1					
42		N.C. RATE 021		DIFF. RATE 022					
43		LAYOUT		1					
44		N.C. RATE 021		DIFF. RATE 022					
45		LAYOUT		1					
46		N.C. RATE 021		DIFF. RATE 022					
47		LAYOUT		1					
48		N.C. RATE 021		DIFF. RATE 022					
49		LAYOUT		1					
50		N.C. RATE 021		DIFF. RATE 022					
51		LAYOUT		1					
52		N.C. RATE 021		DIFF. RATE 022					
53		LAYOUT		1					
54		N.C. RATE 021		DIFF. RATE 022					
55		LAYOUT		1					
56		N.C. RATE 021		DIFF. RATE 022					
57		LAYOUT		1					
58		N.C. RATE 021		DIFF. RATE 022					
59		LAYOUT		1					
60		N.C. RATE 021		DIFF. RATE 022					
61		LAYOUT		1					
62		N.C. RATE 021		DIFF. RATE 022					
63		LAYOUT		1					
64		N.C. RATE 021		DIFF. RATE 022					
65		LAYOUT		1					
66		N.C. RATE 021		DIFF. RATE 022					
67		LAYOUT		1					
68		N.C. RATE 021		DIFF. RATE 022					
69		LAYOUT		1					
70		N.C. RATE 021		DIFF. RATE 022					
71		LAYOUT		1					
72		N.C. RATE 021		DIFF. RATE 022					
73		LAYOUT		1					
74		N.C. RATE 021		DIFF. RATE 022					
75		LAYOUT		1					
76		N.C. RATE 021		DIFF. RATE 022					
77		LAYOUT		1					
78		N.C. RATE 021		DIFF. RATE 022					
79		LAYOUT		1					
80		N.C. RATE 021		DIFF. RATE 022					
81		LAYOUT		1					
82		N.C. RATE 021		DIFF. RATE 022					
83		LAYOUT		1					
84		N.C. RATE 021		DIFF. RATE 022					
85		LAYOUT		1					
86		N.C. RATE 021		DIFF. RATE 022					
87		LAYOUT		1					
88		N.C. RATE 021		DIFF. RATE 022					
89		LAYOUT		1					
90		N.C. RATE 021		DIFF. RATE 022					
91		LAYOUT		1					
92		N.C. RATE 021		DIFF. RATE 022					
93		LAYOUT		1					
94		N.C. RATE 021		DIFF. RATE 022					
95		LAYOUT		1					
96		N.C. RATE 021		DIFF. RATE 022					
97		LAYOUT		1					
98		N.C. RATE 021		DIFF. RATE 022					
99		LAYOUT		1					
100		N.C. RATE 021		DIFF. RATE 022					

AUTHORIZATION FOR CHANGE IN PAYROLL  
(W) FORM 26735

INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2

LAST NAME		FIRST		MIDDLE		SEX		SECTION		GR. NO.		HRS.		SALARY	
Vaughn						M		111		202					
DIV., DIST., DEPT. & LOCATION (100)															
11 Little Rock															
OCC. OR POSITION - NAME															
Scalox Machine Operator															
LABOR GRADE OR CODE (110)															
4 415															
JOB NO. (110)															
2															
STDL. (110)															
X															
KEY SHEET RATE															
EXTRA FOR															
GR. LDR. W.C.															
HRS. WKLY. MTHLY															
2.210															
CONTROL ACCT.-BUDGET-PRIMARY (111)															
3 000 00 1															
EFFECTIVE DATE (111)															
8/2/70															
NUMBER															
57.5															
RATE RANGE (SALARY (111))															
77.5															
NATURE OF ACTION															
1 EMPLOYMENT - FORMER (10) EMPLOYEE															
YES <input type="checkbox"/> NO <input type="checkbox"/>															
BIRTH DATE (110)															
6/19/50															
CHANGE IN RATE (110)															
HRS. OR SAL. RATE (110)															
CHANGE IN ESTABLISHED HOUSE															
LEAVE OF ABSENCE - FROM TO															
RETURNED FROM LEAVE - DATE (110)															
OR REHIRE															
CHANGE IN JOB OR POSITION (110)															
HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB, IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN MADE. YES ( ) NO ( )															
TRANSFER TO															
SEPARATION - LAST DAY WORKED (110)															
UNION CODE REPRESENTATION (110)															
BAC (110)															
1100 ( ) QUIT WITH NOTICE ( ) RELEASE															
( ) QUIT WITHOUT NOTICE ( ) DISCHARGE															
( ) HAS NOT REPORTED FOR WORK ( ) RETIRED INC. RATE (110) DIFF. RATE (110)															
( ) LAYOFF ( ) DECEASED															
HOME ADDRESS - STREET (110)															
CITY (110)															
STATE (110)															
ZIP CODE (110)															
STATE CODE (110)															
DIV., DIST., DEPT. & LOCATION															
11 Little Rock															
SECTION															
111															
CHECK															
3502															
CONTROL ACCT.-BUDGET-PRIMARY															
02 400 00 1															
OCC. OR POSITION - NAME															
Scalox Machine Operator															
NUMBER															
4 415															
LABOR GRADE OR CODE															
2															
JOB NO.															
2															
GR. NO.															
X															
STDL.															
X															
D.W.															
X															
LAST INCREASE - PROMOTION OR MERIT															
DATE															
AMOUNT															
2.210															
EXTRA FOR															
GR. LDR. W.C.															
X															
HRS. WKLY. MTHLY															
X															
* 1.34 OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY.															
TOT. EMP. DATE (110)															
VAC. DUE EOP (110)															
VAC. AFTER EOP (110)															
VAC. TAKEN (110)															
REMARKS															
Rate Increase rate to be reviewed in two weeks and adjusted in accord with job performance.															
EXEMPTION STATUS															
FED. <input type="checkbox"/> ADMS. <input type="checkbox"/> PRO. <input type="checkbox"/> OUTSIDE SALESMAN <input type="checkbox"/>															
FED. <input type="checkbox"/> HOUSEWIFE <input type="checkbox"/> INDUSTRIAL RELATIONS <input type="checkbox"/>															
DATE															
8/13/70															
DATE															
8/13/70															
This card shall be forwarded directly to Payroll Bureau for SEPARATIONS, EMPLOYMENT and TRANSFERS.															
For all other purposes it shall accompany the original. It will be returned to point of origin as evidence of official action.															
In case of transfer to another Payroll source or to Disability Roll also prepare Form 2354B (Rev. 1).															

AUTHORIZATION FOR CHANGE IN PAYROLL  
OAT FORM 3675

INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE-2

B. AST. 000		FEST		SER 000		SECTION 000		CL. NO. 000		HRS. SALAR.	
Faulstich, C.		F		111		3502		1		000	
DIV., DIST., DEPT. & LOCATION 1980						CONTENT. ACCT.-BUDGET-BRANCH 1980					
11 Little Rock						02 100 00 2					
OCC. OR POSITION - NAME						NUMBER		ESTAB. HRS.		DATE RANGE (ALERT) 000	
Telex Operator						275					
LABOR GRADE OR CODE 010		JOB NO. 010		GR. NO. 010		SHIFT STD. I. D.W.		KEY SHEET RATE		EXTRA FOR	
4		115		2		X				GA. LDR. W.C.	
										HRLT. WKLT. (ATNLT.)	
										2.200	
X EMPLOYMENT - FORMER THIS EMPLOYEE YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> HRS. 432-94-5161 BIRTH DATE 8/10/50											
1 CHANGE IN RATE 130 HRS. OR SAL. REATE 130 2 CHANGE IN ESTABLISHED HOURS 3 LEAVE OF ABSENCE - FROM TO 4 RETURNED FROM LEAVE - DATE 130 5 OR REHIRE											
CHANGE IN JOB OR POSITION OR TRANSFER { HAS PHYSICAL EXAMINATION, REQUIRED PRIOR TO TRANSFER AND/OR CHANGE IN JOB IF EITHER OLD OR NEW JOB REQUIRES PERIODIC EXAMINATION, BEEN ASAG. YES 1 NO 1 }											
6 SEPARATION - LAST DAY WORKED 130 UNION CODE REPRESENTATION 010 RACE 130 7 QUIT WITH NOTICE 1 8 RELEASE 1 9 QUIT WITHOUT NOTICE 1 10 DISCHARGE 1 11 PAY NOT REPORTED FOR WORK 1 12 RETIRED 1 INC. RATE 020 DIFF. RATE 020 13 LAYOFF 1 14 DECEASED 1											
HOME ADDRESS - STREET 010 CITY 010 STATE 010 ZIP CODE 040 STATE CODE 030 1510 S. Valmar, Little Rock AR 72204 11											
DIV., DIST., DEPT. & LOCATION SECTION CHECK CONTROL ACCT.-BUDGET-PERMANENT											
OCC. OR POSITION - NAME NUMBER LABOR GRADE OR CODE JOB NO. GR. NO. SHIFT STD. I. D.W.											
LAST INCREASE - PREVIOUS OR NEXT DATE 020 EXTRA FOR HRLT. WKLT. (ATNLT.) GA. LDR. W.C.											
* ON OTHER THAN EMPLOYMENT, COMPLETE ONLY WHEN REQUIRED LOCALLY. TOT. EMP. DATE 010 VAC. DUE FOR 000 VAC. AFTER FOR 000 VAC. TAKEN 000											
(1100) Will Open Job 70-271. Rate to be reviewed in four years and adjusted in accord with job performance.											
REMISSION STATUS JOB NO. 70-271 DATE 7/4/70 SIGNATURE [Signature]											
This copy shall be forwarded directly to Payroll source for SEPARATIONS, EMPLOYMENT and TRANSFERS. For all other purposes it shall accompany the original. It will be returned to point of origin as evidence of official action. In case of Transfer to another Payroll source or to Disability Roll also prepare Form 2354B (Rev. 1).											

 AUTHORIZATION FOR CHANGE IN PAYROLL  
 (R) 010 26720

INDUSTRIAL RELATIONS/SUPERVISOR/EMPLOYEE - 2

# CHANGE IN EMPLOYEE'S STATUS

TO: INDUSTRIAL RELATIONS DEPARTMENT

THE FOLLOWING CHANGES ARE TO BE MADE IN EMPLOYEE RECORDS EFFECTIVE

DATE 1-20-71

1-25-71

IF TERMINATION, PLEASE GIVE LAST DAY WORKED \_\_\_\_\_

CLOCK NO. <b>3638</b>	EMPLOYEES NAME <b>Christine Vaughn</b>	FROM DEPT. <b>III.3</b>	TO DEPT. <b>III.3</b>	STATED REASON FOR THE TERMINATION OR TRANSFER  <b>Reduction in force</b>
REMARKS:  <b>3922</b>		FROM SHIFT <b>2nd</b>	TO SHIFT <b>3rd</b>	
		FROM JOB <b>Seely Operator</b>	TO JOB <b>Seely Operator</b>	
		NEW FOREMAN <b>Berto</b>		
	SUPERVISOR <b>Bazil</b>		(Signature)	

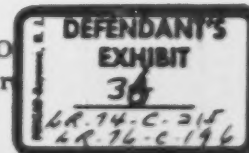
293

## FOR INDUSTRIAL RELATIONS USE

NEW CLOCK NO. \_\_\_\_\_ NEW RATE OF PAY \_\_\_\_\_ REQUISITION

(If transfer)

(Complete reverse side if change in foreman or termination)





## EMPLOYEE EVALUATION

WOULD REHIRE? no WHY? Cannot get production

HOW LONG WORKED DIRECTLY FOR YOU? 3 mos.

QUALITY OF WORK poor QUANTITY OF WORK poor

DID HE GET ALONG WELL WITH OTHERS? yes

ANY CHANGE IN PERFORMANCE? YES \_\_\_\_\_ NO ✓

WHAT? \_\_\_\_\_

WHY? \_\_\_\_\_

WHAT SUPERVISORY PROBLEMS DID YOU HAVE WITH HIM? none

WHAT OTHER JOBS CAN HE HANDLE? \_\_\_\_\_

WHAT ARE HIS STRONGEST POINTS? *X) Excellent*

WHAT ARE HIS WEAKEST POINTS? Absintheism + late to office  
(such as being absent too often, etc.)

(Such as being absent too often, etc.)

SUPERVISOR *[Signature]* DATE 1-20-71

DATE 1-20-71

NAME 1-18-71  
 Surnames Christine Vaughn Clock No. 3638 GEN. DATE 7-13-70  
 Present Job Salix Machine Operator Dept. III E Shift 2nd

OTHER JOBS 70-468 Large Packer Final Dept. III E Shift 3rd  
70-470 Boxing Machine Spine III E 3rd  
70-471 Boxing Machine Spine III E 3rd  
70-472 Boxing Machine Spine III E 3rd  
70-477 Salix Machine Spine III E 3rd  
71-17 Packer - Br 39 III E 3rd

WORKING SATISFACTION EXPERIENCED:

Salix Machine Operator 1st 2d 3rd  
- + -

Least Satisfying Job on 2d shift Large Packer III E  
 I will take # 70-477 Salix Machine Operator III E on 3rd Shift  
 by Christine Vaughn  
 Date 1-18-71  
 Dept. III E Revelation 1-18-71

\* She cannot jump daily rotation since she too is being bumped.



3-9-71

Talked to Christine Vaughn in presence of shop steward about the No. of burnt wires she was getting and the No. of lamps she was sealing.

Made a comparison to 1<sup>st</sup> and 2<sup>nd</sup> shift to point out that the ~~the~~ cause of the burnt wires was her and not the fault of the machine, (operator aid, Ect.)

Also pointed out that she had been on the machine longer than the girls on the other shifts and should be doing better than cont.

than she has been.

I explained her role and the importance of it as a Telex operator and that I expected her to work harder at her job.

Christine had very little to say except that she would  
do.

## Operator Burned Wires

3rd shift

	Pick up	Total	Prod.
2-25-71	2-3-12	17	7104
3-1-71	5-4-6-5	20	5952
3-2-71	2-7-3-6-16	34	5856
3-3-71	3-7-10-27	47	6912
3-4-71	3-8-15-13	39	6720
3-8-71	2-10	12	355
		<u>169</u>	

1st

2-25-71	3-1	4	6624
3-1-71	1-6-1-1-5-2	16	8448
3-2-71	1-1-1-2-2	7	8352
3-3-71	3-5-5-2-4	19	7392
3-4-71	3-4-6-2	15	8256
5-8-71	1-2-1-6	10	5088
		<u>71</u>	

2nd

2-24-71	2-1-2-5-10	20	6912
2-25-71	2-4-1-3	10	8160
3-1-71	2-4-1-3	10	3600
3-2-71	2-5-1-3	11	4896
3-3-71	5-3	8	5568
3-4-71	4-6-5-2-2	19	8256
		<u>78</u>	

3-23-71

In observing the Gp.#17 Six  
I found the Sealer was missing  
approx. 1/4 of the Sealing Heads.

When I approached her about this  
she said her arm hurt and she  
couldn't do her job as fast as  
she should be. I told her that  
I couldn't accept that as an  
excuse, because she had  
made excuses on other occasions  
and we couldn't make excuses  
each night as to why we  
weren't doing our jobs, and  
that I expected immediate  
improvement, at which she  
did start keeping up.

I later made it a point to  
check on her again and found  
the same condition that con.



existed to go.

At this I got the ship steward  
to come at once and put me  
in the intention of talking  
to Christine again, but  
because of the lateness decided  
to wait.

Mr. Glenn Thompson also witnessed.

3-24-71

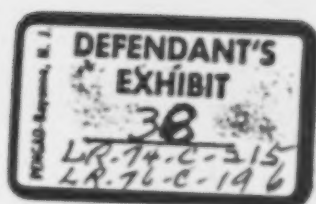
Talked with Christine Vaughn on the floor this a.m. and told her that her production was up closer to what I'd like to see it, but that her burnt wires were still bad.

I showed her the shrinkage sheet and how the burnt wires had gotten progressively worse as the shift progressed. I also showed her that this constituted a good deal of money at the lamp's retail value.

She expressed her dislike for her job and said she wanted to bid off.      cont.

I explained she hadn't been on the job long enough to bid on a #4 or less job and that until she has been there long enough she would have to put more effort into the job she has.

I also told her if she would like, to watch the extra girl "who was relieving her at the time" to pick up any tips that would help her become more efficient in her work, and that I expected her to try harder. She watched for a few min & went back to work.



3-30-71

2:30 AM

Talked to Christine Vaughn in presence of her Shop steward and told her that I had been watching her for approx  $\frac{1}{2}$  hr. and she was missing too many head to make production, and that for that half hour there were only 480 lamp's packed.

I told her I wanted her to consider this meeting a verbal warning, and went on to say that I was not doing this for any reason other than she was not

doing her job as she should

I told her that I knew she could do the job and that she would have to put more effort into her work.

I told her that if she didn't like her job to do the best she could and in four months she would be eligible to bid off, but in the meantime I expected her to do the work expected of her.

I told her I would be checking her production and watching to see that machine difficulties were not preventing her from getting production, and for her to keep an accurate

down time sheet, that I  
 was counting on her to  
 do her best as she was an  
 important person on the  
 group. That if she was  
 slow the other operators  
 had no choice but to be  
 slow

She said she didn't like to  
 be depended on so much,  
 she did say she would try.

b. T. Lurnage

Present at meeting  
 Clara Stone



4-15-71

Talked to C Vaughn this  
A.M. About the no.# of lamps  
she was sealing, which  
fell far short of production.  
Also about the no.# of operators  
burned wires, and pointed  
out that she had already  
ran 22 so far tonight @ 2:30  
and on 4-14 there were 60  
on 4-13 = 50 Ect. Ect.

I pointed out that she was  
missing far too many head  
to be able to get production  
and told her that I had  
watched her on occasion con



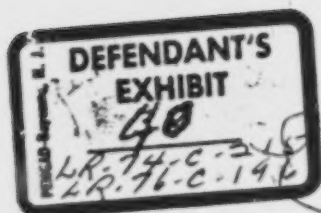
and saw three or four empty heads & ports on the sealer. I mentioned that this was 10% or more of the heads she was missing and at that rate it would be impossible to get production. Told her I was watching her and comparing her with 1<sup>st</sup> & 2<sup>nd</sup> shift and she fell far short of either one on production & ran far more burned wires. Told her she averaged one case behind every hour

and she would have to improve or I would have to use stronger disciplinary actions.

At one point in the meeting I had to stop to ask if she was asleep as she had her eyes closed she opened them and said she wasn't.

Also at meeting was shop steward Clara Stern

P.S. Next shrinkage pick up there were 41 burned wires (operator) Total 78 total production 9180 with 40 min. Relief time



4-19-71  
J. L.

Had meeting with C. Vaughn in presence of shop steward (Clara Stone) and informed Christine that due to her obvious dislike for her job, the number of operator turned wires and the fact they were no better after repeated talks and warnings and her production which has been unsatisfactory and getting no better that I had no alternative but to disqualify her from the job of sealex machine operator. I told her that this meant she would be unable to hold cont.

that position again.

I told her she was being placed on an open job of bulb loader hand, working for Mr. Crowder, as of this night. I also told her she had bidding rights when she goes on the job and could put request's in if she wanted another job.

I then Turned her over to Mr. Crowder.

b. f. Lurnage

# CHANGE IN EMPLOYEE'S STATUS

CK

DATE April 19, 1971

TO: INDUSTRIAL RELATIONS DEPARTMENT

THE FOLLOWING CHANGES ARE TO BE MADE IN EMPLOYEE RECORDS EFFECTIVE April 19, 1971

IF TERMINATION, PLEASE GIVE LAST DAY WORKED \_\_\_\_\_

CLOCK NO. <u>4002</u>	EMPLOYEES NAME <u>Christine Vaughn</u>	FROM DEPT. <u>III-3</u>	TO DEPT. <u>III-8</u>	STATED REASON FOR THE TERMINATION OR TRANSFER <u>Disqualified</u>
REMARKS: <u>Disqual. fired as scales mach. oper. - Not Eligible to hold this job in future placed on open job #71-98 Rate to be reviewed in 2 wks</u>		FROM SHIFT <u>3rd</u>	TO SHIFT <u>3rd</u>	
		FROM JOB <u>Scales machine operator</u>	TO JOB <u>4-415 Bulb Loader hand</u>	
		NEW FOREMAN <u>Mr. Crowder</u>		
		SUPERVISOR <u>G. S. Lurnage</u> (Signature)		
<p>2nd adj. in performance</p> <p>FOR INDUSTRIAL RELATIONS USE</p> <p>IS NO Satisfis <u>3979</u></p> <p>NEW CLOCK NO. <u>3979</u></p> <p>NEW RATE OF PAY <u>2.455</u></p> <p>REQUISITION (If transfer)</p>				

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(Complete reverse side if change in foreman or termination)

## EMPLOYEE EVALUATION

WOULD REHIRE? No WHY? Poor Attitude

HOW LONG WORKED DIRECTLY FOR YOU? \_\_\_\_\_

QUALITY OF WORK Poor QUANTITY OF WORK Poor

DID HE GET ALONG WELL WITH OTHERS? Yes

ANY CHANGE IN PERFORMANCE? YES \_\_\_\_\_ NO X

WHAT? \_\_\_\_\_

WHY? \_\_\_\_\_

WHAT SUPERVISORY PROBLEMS DID YOU HAVE WITH HIM? Unable to motivate

WHAT OTHER JOBS CAN HE HANDLE? \_\_\_\_\_

WHAT ARE HIS STRONGEST POINTS? Good attendance

WHAT ARE HIS WEAKEST POINTS? No interest in Sealex machine operator Job  
(Such as being absent too often, etc.)

SUPERVISOR L. I. Lurnage DATE April 19, 1971

## TRAINING AND SKILLS SURVEY

## LITTLE ROCK LAMP OPERATIONS DIVISION

1. Are you familiar with the transfer procedure for upgrading and promotion at this plant?  
☒ Yes      No      Uncertain
2. Are you aware of the Westinghouse Educational Opportunity Program which helps pay the cost for training programs employees take to further their skills and abilities?  
☒ Yes      No
3. Have you ever used the Westinghouse Educational Opportunity Program?  
 Yes      ☒ No
4. Do you know the procedure for making application to other jobs at Little Rock?  
☒ Yes      No
5. If the courses were available at a local school (non-Westinghouse), would you be willing to acquire more training on your own time if it would qualify you for better-paying jobs?  
☒ Yes      No      Uncertain
6. Since you started working for Westinghouse, have you participated in any non-Westinghouse courses which you believe have prepared you for a higher-paying job at Westinghouse Little Rock?  
 Yes      ☒ No
7. List any additional education or training you have received since your first employment at Westinghouse.

~~Went to~~ I attended Shodor College for one (1)  
 Semester.

(continued on back)





8. Have you ever completed a training course in mechanical drawing or blueprint reading?

Yes

☒ No

9. Have you ever completed a course in any area of:

mechanics?

Yes

☒ No

maintenance?

Yes

☒ No

industrial arts?

Yes

☒ No

If yes, please list courses:

10. What math courses have you completed? (List courses such as basic arithmetic, algebra, plane geometry, etc.)

Arithmetic

Algebra

Plane geometry

11. Have you had any experience in:

maintenance?

☒ Yes

No

mechanical areas?

☒ Yes

No

If yes to either of the above, please describe:

Only what I can do around my house or my car.

12. Have you ever used any hand tools such as pliers, socket wrenches, allen wrenches, etc.?

☒ Yes

☐ No

If yes, please list the tools:

Pliers

13. Have you ever used any power hand tools, such as electric drills, air-powered socket wrenches, etc.?

☐ Yes

☒ No

If yes, what tools?

14. Do you do any type of maintenance work at home?

☒ Yes

☐ No

If yes, what kind?

On my motorcycle taking it apart. I've put new Delta where needed. Delta it out, etc.

15. Do you ever do maintenance on anything like your automobile, power lawn mower, motor boat, etc.?

☒ Yes

☐ No

If yes, what kind do you do?

On my car, put shocks on. Tighten up different screws. Change my oil, you bet.

(continued on back)

16. Are you familiar with the job duties of a machine attendant in the Little Rock Plant?

☒ Yes

☐ No

17. Have you ever held a job, or had other practical experience, which you feel would qualify you to perform the machine attendant job duties in this Plant?

☐ Yes

☒ No

If yes, please describe the experience:

18. Do you believe any of your hobbies would relate in some way to the performance of a machine attendant type job?

☐ Yes

☒ No

If yes, please list the hobbies:

19. Would you be interested in training in the plant for a machine attendant job?

☐ Yes

☒ No

20. Are there higher-paying jobs here for which you believe you already have the qualifications?

☒ Yes

☐ No

If yes, list the jobs:

*I feel like I qualify to be utility operator.*

signature

21. Have you ever decided not to accept a higher-paying job that was offered to you at this plant?

Yes

☒ No

If yes, what was the job and why did you turn it down?

22. Have you ever been turned down for a job which you requested or bid on at Westinghouse which you believe you were qualified to do?

Yes

☒ No

If yes, what was this job?

23. Are there any particular higher-paying jobs at this plant for which you would like to be trained?

Yes

☒ No

If yes, please list the jobs:

24. Do you believe there are any jobs in this plant which you think you can do but which you would not be accepted on because you are a woman?

Yes

☒ No

If yes, please list job(s) and explain why.

25. Are there jobs in this plant which you, personally, consider to be unsuitable for you, as a woman?

Yes

(No)

If yes, please list the jobs and the reasons why you feel they are unsuitable.

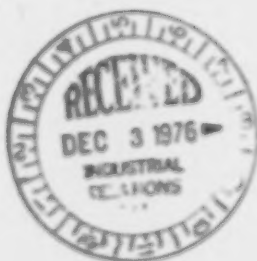
YOUR NAME

*Christina Ziegler*

YOUR JOB TITLE

*Heavy Operator*

Delivered:



# REQUEST FOR TRANSFER

## MY REQUEST

Job Title Sealey Machine operator

Department III. 3

Shift third

Have Previously Held Job \_\_\_\_\_

Yes \_\_\_\_\_ No X

Date of this Request March 18, 1971

Other Jobs Bid On Train Capt

Bid Code No. \_\_\_\_\_

Have you been upgraded in the past six months? Yes

If bidding on equal or lower-rated job, have you \_\_\_\_\_

(a) Been on present job twelve (12) months continuous? Yes

(b) Or if Machine Attendant, two or more continuous years on present job? \_\_\_\_\_

## MY RECORD

Seniority Date 8-12-69

Present Job Sec 4 Mount Inspector

Department III. 8

Shift third

Foreman George Edwards

My Name Paul H. Hannon

Patti Sparrow 8.12.69  
 Jackie Jackson 3.10.69 4/27/71  
 C. J. J. J. J. J.





IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

Christine Vaughn and  
Marion Gee,

Plaintiffs,

V. NO. LR-74-C-215

Westinghouse Electric Corp.; International  
Brotherhood of Electrical Workers, AFL-CIO,  
Local 436; and International Brotherhood of  
Electrical Workers,

Defendants,

and

Glenda Crutcher,

Plaintiff,

V. NO. LR-76-C-196

Westinghouse Electric Corp.,

Defendant.

OPINION

This is a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, to redress alleged discrimination in employment on the ground of race. The two captioned cases have been consolidated. At a pretrial hearing, the motion of defendants to deny class certification was granted, and the case went to trial as three individual claims. Two of the plaintiffs, Marion Gee and Glenda Crutcher are former employees, of Westinghouse Electric Corporation. The other plaintiff, Christine Vaughn, is still employed by the defendant Westinghouse. The claims against the defendant labor organizations were settled before trial, and a consent decree has been entered embodying this settlement. The case was tried to the Court on April 24, 25, 26, 27, and 30, 1979. All parties have rested, and the case is now ready for decision.

Plaintiffs present a variety of claims of disparate treatment by their employer. The nature and order of proof in this kind of case are set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There the Supreme Court held that the plaintiff must carry the initial burden of establishing a prima facie case of racial discrimination. In *McDonnell Douglas*, a failure-to-rehire case, the Court specified the following method of establishing such a case:

This may be done by showing (i) that he [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (Footnote omitted.) 411 U.S. at 802.

Here, no plaintiff claims that the employer discriminatorily failed to hire her. Each of these plaintiffs was at some point employed by Westinghouse. Instead, plaintiff Crutcher claims an unlawful discharge, and plaintiffs Vaughn and Gee claim that they were unlawfully disqualified from certain jobs they had been holding and made to take other, less desirable jobs. The Supreme Court has made clear that the *McDonnell Douglas* formulation should not be applied woodenly to every situation. "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 801 n.13. In the present situation, the *McDonnell Douglas* test, *mutatis mutandis*, requires plaintiffs, in order to establish a prima facie case of racial discrimination, to show that they belong to a racial minority, that they were employed by the defendant in a certain capacity, having been initially found to be qualified in that capacity, that they were discharged or disqualified from their jobs, and that following their discharge or disqualification defendant con-

# ACCEPTANCE NOTICE



TO FOREMAN \_\_\_\_\_  
CC: INDUSTRIAL RELATIONS

REQUISITION NO. 7-1-71

DEPT. III-8 SHIFT 3<sup>rd</sup>

I HAVE ACCEPTED EMPLOYEE. Patti Sparrow

ON JOB \_\_\_\_\_ DEPT. i SHIFT 1<sup>st</sup>

DATE 4-29-71 & HOUR ACCEPTED 3:45<sup>PM</sup>

L. L. Lurnage  
FOREMAN

Note: Attach copy of receipt from Foreman to Industrial Relations.

# EMPLOYMENT REQUISITION

WESTINGHOUSE FORM 23550-R

71-119

HOURLY SALARY DATE REQUIRED

X

Now

LEADER GRADE OR CODE	JOB NO.	SHIFT NO.	ASSIST NO.	STD. TIME	DAY WORK	NO. CODE	KEY SHEET DATE	OTHER CODE FOR P.C.	STARTING RATE	HLT/HLT/HLT
4		3 <sup>rd</sup>							\$	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>

GCC OR POSITION NAME	NUMBER	TYPE OF PASS TO BE ISSUED	ESTAB. NOS.
Sealex Machine Operator		NO. <input type="checkbox"/> EXEMPT <input checked="" type="checkbox"/>	

PERMANENT	TEMPRY	APPROX. TIME	ADCL	REPLACING
X				C. Vaughn (Disqualified)

CONTROL ACCT. BUDGET PRIMARY ACCT.	DIV., DIST., DEPT. & LOCATION	PAY STATION

REMARKS	FOREMAN/SUPERVISOR	DATE
	PERSONNEL/DEPT. HEAD	DATE
	B. J. Lunnage	4-23-71

THE PERSON NAMED BELOW HAS BEEN INTERVIEWED AND ACCEPTED UNDER ABOVE CONDITIONS.	PRE-EMPLOYMENT PHYSICAL EXAMINATION		
	NO.	GENERAL	ABOVE
M			
WILL START	SUPERVISOR	PHYSICIAN'S SIGNATURE	DATE
		Paul Spaworth	

REMARKS

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tinued to seek and employ persons for the jobs in question. In addition, they have the burden of showing, either by statistical evidence or by testimony of specific racially motivated incidents, that there is probably cause to believe that their discharge or disqualification was motivated in substantial part by race.

This Court finds that the proof is more than sufficient to establish a prima facie case. Title VII of the Civil Acts Right of 1964 became effective on July 2, 1965. At that time almost no blacks were employed by the defendant Westinghouse. There was one black white-collar employee, a secretary. No blacks were in supervisory positions and only one black had been hired (in 1963) as a production employee. The situation has changed rather slowly. Out of 22 office and clerical employees, only three are black at the present time, none of them in a supervisory position. No black person has ever been employed as a supervisor in the defendant's office force at its Lamp Operations Division plant in Little Rock, the plant involved in this case. Out of 25 to 26 supervisors, including manufacturing supervisors, who hold the entry-level management jobs, only two are now black. One of these has been a supervisor only a year or a year and a half. There is no regular program for allowing production employees to rise to supervisory ranks. When supervisory positions become open, this fact is not systematically publicized, and these jobs are not posted. The only jobs posted are production of "bargaining unit" jobs. The defendant's overall work force is roughly representative of the proportion blacks and whites in the relevant population, but black employees are heavily, indeed almost exclusively, concentrated in production jobs, which are lower paying. In addition, many more black people than white people apply for jobs at Westinghouse. The following statistical table is illuminating:

Year	Black Applicants	Black Persons Hired	White Applicants	White Persons Hired
1970	175	56	303	118
1971	341	17	434	78
1972	1902	96	1124	149
1973	2209	90	1104	212

W. T. Hunnicutt, Personnel Manager for the Little Rock plant, testified that he did not know how to explain these figures, and the Court must agree. The inference is very strong indeed that the number of black people hired is being artificially depressed. No particular qualifications are required for production-level jobs at this plant. There is no reason whatever to suppose, to take 1972 as an example, that 149 whites out of 1124 would be qualified, while only 96 blacks out of 1902, a much larger applicant pool, would make the grade. If objective criteria had been or could be prescribed for these jobs, the situation would be different, but apparently persons are hired simply because the employer wants them. Up until 1965 substantially all the employees were white, and perhaps the employer believes that harmony in its work force can best be preserved by not allowing the number of black employees to exceed by much their proportion in the general population, about 18 or 20%. This motivation is forbidden by law. The law requires not that black people be employed proportionately, but that each applicant, regardless of race, receive equal opportunity. The Supreme Court's pronouncement in *Furnco Constr. Corp. v. Waters*, \_\_\_ U.S. \_\_\_, \_\_\_, 57 L.Ed.2d 957, 969 (1978), is unmistakable:

It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce. (Emphasis in original.)

In addition, on February 1, 1974, an organizational chart of management positions at the Little Rock plant only listed one black person out of 31. This organizational lineup is still basically the same, except that there are now two blacks out of 31. Both of these employees, however, are first-line manufacturing supervisors, or foremen. The same sort of statistical proof is apparent in hiring figures for maintenance jobs. In 1970, no blacks were hired out of 15. In 1973, no blacks were hired out of 31. And in the years 1970 through 1974, only seven blacks were hired out of 93. Between 1972 and 1978, a total of 65 persons were discharged, 39 of whom were black, a figure far above the overall proportion of black employees, which now is at a high of about 24 or 25%. Possibly this over-representation of blacks in the discharge population is simply a result of chance, and the Court is not holding that any of these particular discharges was illegal. The discharge figures, however, simply add to the impression that there cannot be so much smoke without at least some fire. With the exception of some maintenance jobs, moreover, no specific qualifications have been set out by the employer either for production-line jobs, as noted above, or for supervisory jobs. Subjective criteria for employment are not illegal in themselves, but the fact that an employer has continued to use them, with the danger of disparate treatment that they entail, is a factor to be considered.

The evidence making a *prima facie* case goes beyond statistics. Laying to one side for the time being the testimony of the parties themselves, the Court was especially impressed by the evidence given by Wilma Donley, a former employee. Ms. Donley was employed at Westinghouse from August 31, 1972, through August 28, 1978. She was a bright and diligent worker, though she had some difficulties with absenteeism and lateness. From February 1973 to December 1974 she was a shop steward for the union, International Brotherhood of Electrical Workers, AFL-CIO, Local 1136. In this capacity she witnessed harassment by supervisors of several black



employees. She prepared and processed grievances for them. There was a good deal of conflict between foremen and black employees, including bickering and weeping. After January 9, 1975, when Ms. Donley's twins were born, she was no longer formally a shop steward, but she did continue in an informal capacity to help employees who felt aggrieved, all of whom were black. Ms. Donley observed black employees being given work that rightfully belonged to others, and white employees being permitted to loaf in the bathroom. Substantially more grievances originated with black employees than with whites, and on one occasion Ms. Donley took a group of black employees to an attorney to complain. None of these employees is still with the company. It is not claimed, and the Court does not find, that any of these persons was discharged for consulting an attorney. The visit to the lawyer, and the fact that none of these persons is still at Westinghouse, are simply two more bits of the mosaic that the Court must piece together. Ms. Donley continued to be a spokesman for black employees and was treated as such by foremen. She was finally discharged in 1978 after being absent for reasons of health for some time. Ms. Donley is not a party and did not specifically claim on the witness stand that her discharge was retaliatory in nature, so it is unnecessary for the Court to comment on that question.

Ms. Donley's testimony was wide-ranging, and the above is simply a general summary. Much of what she said was contradicted by company witnesses, but in view of her record as a competent worker and of the absence of any substantial motive for falsification, this Court specifically credits Ms. Donley's testimony. On the basis of this evidence, together with the statistics recounted above, the Court holds that the plaintiffs have made out a *prima facie* case of racial discrimination.

Under *McDonnell Douglas*, the burden then shifts to the defendant to show that the personnel actions taken were based upon some legitimate, nondiscriminatory

reason. This issue of course implicates the defendant's personnel actions with respect to the individual plaintiffs, and each of the plaintiffs will be discussed in turn.

1. *Glenda Crutcher.*

Ms. Crutcher was employed on May 1, 1972, as a sealex machine operator, labor grade 4, on the second shift at the rate of \$2.48 per hour. She was "hired in" by supervisor C.T. Turnage, but was almost immediately transferred to supervisor Roger Maynard. On June 4, 1973, Ms. Crutcher transferred at her request to the labor grade 3 job of mount inspector — coil feeder at the rate of \$2.92 per hour. On May 27, 1974, she was transferred as a result of a reduction in force to the labor grade 1 job of flimsie paster at the rate of \$3.06 per hour. Her supervisor then became Carl Menyhart. On September 9, 1974, she transferred at her request to the labor grade 1 job of repacker at the rate of \$3.22 per hour. On January 16, 1975, she was transferred as a result of a reduction in force to the labor grade 3 job of mount inspector — coil feeder at the rate of \$3.68 per hour. Her supervisor became James Birch. On September 22, 1975, she transferred at her request to the labor grade 1 job of getter application operator on the first shift at the rate of \$3.52 per hour. Her supervisor became D.J. Bartholomew.

On October 3, 1975, Ms. Crutcher was given a three-day disciplinary suspension. The reasons stated were insubordination and belligerence towards her supervisor. She was given a written warning that future offenses would result in termination. On November 19, 1975 she was terminated, and the reasons given were continued insubordination and use of abusive language.

Ms. Crutcher's specific claims were that she was refused adequate training or help when temporarily transferred to the job of bulb washer, that she was verbally abused and harrassed by her supervisors, that she was given a disciplinary suspension for three days, and that she was ter-

minated, all on account of her race and without just cause. Taking into account both Ms. Crutcher's testimony and that of her supervisor's, but relying especially on the copious documentary evidence supplied by the defendant, see *International Bh'd of Teamsters v. United States*, 431 U.S. 324, 360 n. 45 (1977), this Court is persuaded that the defendant has met its burden with respect to each of these issues. Ms. Crutcher was in fact given sufficient training, though most of the training came not from the supervisors personally, but instead from other employees assigned for the purpose. Whether training is done by the supervisor or by another employee, and whether the employee giving the training is white or black, are both immaterial. The fact is that training was given, and there is no occasion to determine whether any lack of training might have been due to the employee's race.

The job of bulb washer, which Ms. Crutcher was temporarily assigned to perform, apparently was a particular bone of contention. Her regular job at the time was getter applicator, also referred to by the parties as getter girl. "Getter" is a liquid applied to light-bulb filaments to prevent them from burning too quickly or unevenly. It frequently occurred in the course of the production process that there was no more need for getter to be applied, and when Ms. Crutcher assumed the position of getter applicator this fact was carefully explained to her. She was told at the time that it would be necessary to assign her temporarily to certain other jobs, including that of bulb washer. The Court visited the Westinghouse plant and observed in particular the bulb-washing machine. The machine consists essentially of a series of racks, each of them capable of holding four bulbs. The machine moves at eight-second intervals, during each of which one employee, standing on one side of the machine, must place into the rack four bulbs. Another employee, standing on the other side of the machine, removed the bulbs from the rack after they have passed through a washer. The Court stood and observed this machine for some time. On the occasion of the

Court's visit the machine was moving at exactly the same speed as in 1975, when the conflict arose between Ms. Crutcher and her employer. The job is of no particular difficulty and should have required little, if any, training. It does require some manual dexterity and attention, as well as diligence in circumstances that must inevitably be tedious, but the job can in no way be described as complex or exacting. (As a matter of fact, Ms. Donley testified that none of the jobs at the plant was difficult, and that all of them could be properly performed if a person diligently applied herself.) The Court believes that Ms. Crutcher was capable of performing this job and failed to do so because she did not like it.

Various altercations between Ms. Crutcher and some of her supervisors ensued. The testimony as to who said what to whom is sharply conflicting. The matter began to come to a head after Ms. Crutcher became a getter applicator under supervisor D.J. Bartholomew. As noted above, part of her duties was to work on the bulb-washer when there was no need to be applying any getter. On September 29, 1975, Ms. Crutcher went reluctantly to the job. Her performance did not improve. She told Mr. Bartholomew it would not improve because bulb-washing was not her regular job. On September 30, 1975, she told Mr. Bartholomew that the getter job was hers and that bulb-washing was not. She threw her gloves against the window and refused to clock out when instructed to do so. Mr. Bartholomew recommended that she be discharged, but the matter was resolved with a three-day disciplinary suspension, including a written warning that the next offense would result in termination. On November 3, 1975, Mr. Bartholomew saw Ms. Crutcher at her post reading a book. It was a violation of posted company rules to have personal reading matter in the plant. Upon being admonished, Ms. Crutcher replied in obscene terms. She also told him that his only duty was to see that she got her paycheck. She referred to Mr. Bartholomew and to Richard Thompson, his superior, with a racial epithet. On November 19, 1975, she was discharged.

The Court finds that this discharge was legitimate and non-discriminatory. Ms. Crutcher's supervisors did not abuse or harass her verbally — quite the contrary. The company legitimately felt that her work and attitude were unsatisfactory. The fact that the company may have discriminated generally is not an automatic shield for every black employee who claims unfair treatment. An employee still owes his employer a day's work for a day's pay, and it is the duty of the employee to follow proper instructions. This Ms. Crutcher failed to do. Under *McDonnell Douglas* she could still prevail by showing that the reasons given for her discharge were merely pretextual, a cloak for racial motivation. There is no persuasive evidence in this record to that effect.

2. *Marian Gee.*

Plaintiff Marian Gee was hired by Westinghouse on June 8, 1970, in the labor grade 4 job of sealex machine operator at the rate of \$2.20 per hour. On October 19, 1970, she was disqualified as a sealex operator and placed on the open labor grade 1 job of bulb-loader-hand at the rate of \$2.55 per hour. On November 1, 1971, she changed from second to third shift at the request of the company and was then making \$2.45 per hour. On January 22, 1973, she transferred at her request to the labor grade 3 job of mount inspector-coil feeder on the second shift at the rate of \$2.76 per hour. On April 2, 1973, employee Gee was disqualified as a mount inspector-coil feeder and returned to her former job of bulb-loader-hand at her former rate of \$2.76 per hour. On February 11, 1974, employee Gee transferred at her request to the labor grade 3 job of packaging operator — sleeving at the rate of \$3.06 per hour. She remained in this job on the second shift until the date of her termination on February 14, 1975, for possession of a loaded firearm on company premises in violation of company rules. At the time of her termination, she was paid at the rate of \$3.52 per hour.



Ms. Gee does not contest the legality of her termination. She does claim that she was disqualified from certain jobs, and verbally abused and harrassed by supervisors, on account of race. The two dis-qualifications at issue occurred on October 19, 1970 (sealex operator), and on April 2, 1973 (mount inspector-coil feeder).

Roger Maynard was the supervisor who disqualified Ms. Gee on both occasions. She was a sealex operator under his supervision for about a month in 1970. He testified that her work was characterized by too much "shrinkage," that is, waste caused by burned wires. After a month on the job, according to Mr. Maynard, shrinkage should be between 15 and 25 wires per shift, but Ms. Gee went as high as 300 or 400 wires. He discussed the problem with her and gave her a considerable amount of his own time to attempt to train her better, but to no avail.

On January 16, 1973, Ms. Gee returned to Mr. Maynard's supervision, this time as a mount inspector-coil feeder. Mr. Maynard made thorough contemporaneous notes on Ms. Gee's performance. He gave her special instruction on how to start the machine, to which she did not respond. A number of other operators were assigned to work with her, and each of them said that she wasn't catching on. On January 30, 1973, she unexpectedly started up her machine while a maintenance man had both of his arms inside it. A major accident was avoided only by luck. On another occasion, she laid her glasses down inside her machine while it was running and jammed it. Mr. Maynard assigned Linda Krebs, a co-worker, to assist Ms. Gee for ten working days. She improved considerably, but not enough in his judgment. On March 20, 1973, Mr. Maynard warned Ms. Gee that she would be disqualified within ten days if her work did not substantially improve. On March 26, 1973, Mr. Maynard observed Ms. Gee's work station "in a mess." In addition, her log of coils was almost illegible. On April 2, 1973, Ms. Gee was disqualified. According to Mr. Maynard, she made a sincere effort but was unable to do the job,

primarily because her hands and fingers were too large to deal with the delicate work required.

The Court is persuaded that Mr. Maynard's actions were not based on any racial motivation. He made a good-faith judgment about Ms. Gee's ability to perform two particular jobs. There is no persuasive evidence that these stated reasons were merely pretextual. When Ms. Gee was replaced (and this is true of all of the employees involved here), her position was filled on a strict seniority basis, a system that is not illegal in and of itself. *International Bh'd of Teamsters v. United States*, 431 U.S. 324 (1977). Nor was Ms. Gee verbally abused or harassed, for racial reasons or otherwise. Her supervisor did speak with her a number of times in an effort to encourage better performance, but these visits were reasonable and required by the supervisor's own responsibilities.

### 3. Christine Vaughn.

The plaintiff Vaughn was hired by Westinghouse on July 13, 1970, as a sealex machine operator, labor grade 4, at the wage rate of \$2.20 per hour. On or about November 16, 1970, she was transferred to supervisor Oscar Brazil's section as a sealex machine operator and was then earning \$2.54 per hour. On January 25, 1971, she was changed from second to third shift due to a reduction in force and continued working as a sealex operator receiving a general wage increase which raised her rate of pay to \$2.69 per hour.

On April 19, 1971, supervisor C.T. Turnage disqualified Ms. Vaughn as a sealex operator. She was placed on an open labor grade 1 job of bulb-loader-hand earning \$2.45 per hour. On November 6, 1972, Ms. Vaughn transferred at her request from second to third shift and was then making \$2.76 per hour as a bulb-loader. On January 29, 1973, she transferred again at her request to the job of packaging operator-sleeving, a labor grade 3 job, with the same rate of



\$2.76 per hour. On March 28, 1977, she changed from packaging operator-sleeving to utility operator simplex incandescent group (SIG) with the rate of pay of \$4.46 per hour.

On April 19, 1977, Ms. Vaughn became disabled, but she returned to work on June 13, 1977, as a utility operator earning \$4.71 per hour. On January 1, 1979, she was transferred as a result of a reduction in force back to the job of packaging operator-sleeving at the rate of \$5.40 per hour. She has continued in this job until the present time.

Ms. Vaughn claims that she was disqualified from the sealex job, declared surplus from other jobs, denied promotional opportunities, issued a written warning for being repeatedly late to work, and verbally abused and harassed by her supervisors, all on account of race. With the exception of her disqualification as a sealex operator, all of Ms. Vaughn's changes in jobs were occasioned either by her own request or by a bona fide reduction in force, having the result under Westinghouse's legal seniority system of "bumping" her to another job. In addition, there were attendance problems with Ms. Vaughn which are amply documented in the company's records. There is no evidence that she was verbally abused or harrassed, on account of race or for any other reason. With respect to these claims, the Court holds that the defendant has borne its burden.

The result is otherwise, however, with regard to Ms. Vaughn's claim that she was disqualified as a sealex operator on account of her race. The Court has carefully considered the testimony of defendant's witnesses on this point and has studied each of the exhibits offered with respect to Ms. Vaughn's work record as a sealex machine operator. As noted above, on January 25, 1971, she was transferred from second to third shift because of a reduction in force. She had been a sealex operator on second shift under O.D. Brazil, and transferred to the same job on third shift under C.T. Turnage. Mr. Brazil's employee evaluation

form with regard to Ms. Vaughn, dated January 20, 1971, states that her quality and quantity of work were poor and that she could not make production. Mr. Brazil also stated that he would not rehire Ms. Vaughn. On the other hand, she got along well with others, and Mr. Brazil had no supervisory problems with her. Most important of all, a form dated January 18, 1971, signed by both Ms. Vaughn and Mr. Brazil, stated that she had had "previous satisfactory experience" as a sealex machine operator on the second shift. The Court must conclude that, although Mr. Brazil had some problems with her, he did not consider them serious enough to label her work "unsatisfactory." She then began to work under Mr. Turnage's jurisdiction. On March 9, 23, 24, and 30, and on April 15, 1971, Mr. Turnage warned Ms. Vaughn about production problems, including what he believed to be too many burned wires. Finally, on April 19, 1971, Mr. Turnage disqualified her, stating that although she got along well with others, he had been unable to motivate her, and believed she had no interest in the job of sealex machine operator. Her disqualification form stated that she would not be eligible to hold this job in the future.

The Court is not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons. Racial motivation is often difficult to isolate. In the nature of things, it will rarely appear on the surface, or at any rate has rarely done so in recent years. The Supreme Court has warned that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *International Bhd of Teamsters v. United States*, *supra*, 431 U.S. at 343 n. 24; *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). The prima facie case made here did not relate specifically to disqualifications of employees, but the evidence recounted above is sufficient to show that Westinghouse maintained a stratified job environment. The more desirable jobs, for whatever reason, were held by white people, in general. The resulting pervasive atmosphere makes it incumbent upon Westinghouse, if it is to prevail, to show that

the proof on its side is preponderant. The quality of proof with respect to Ms. Vaughn falls short, in this Court's opinion, of that offered with respect to the other two individual defendants. She was never a discipline problem and was always cooperative. She had difficulty with absenteeism, but not so great as to warrant dismissal. [She has served in a variety of capacities, including a utility operator, an employee who must operate a number of different machines in quick succession.] In addition, Ms. Vaughn received increases in pay while she was a sealex machine operator and, in fact, was being paid the *top rate* at the time of her disqualification. A "bump sheet," representing the state of the company's records as of January 1, 1979, indicated that she had previously performed the sealex machine operator's job satisfactorily. She unquestionably had problems with production, but the absence of objective production criteria makes it difficult for the Court to hold that these problems were serious enough to meet the burden imposed on the defendant by law. Apparently defendant's supervisors had numerical standards to judge performance, but these standards were not communicated to the employees and were not revealed to the Court in testimony. Furthermore, employees are not given any chance to re-qualify for a certain job after they have been disqualified. There was testimony that an employee with relevant experience could try out for such a job again, but how could Ms. Vaughn have obtained this experience? The only way to obtain experience operating a sealex machine is to operate the machine, and this is the very opportunity that was denied her by the defendant.

In short, this is a case where the *McDonnell Douglas* rules as to burden of proof are dispositive. Defendant's position is by no means without support, but it has simply failed to persuade this Court that its proof is sufficient to overcome plaintiff's *prima facie* case with respect to Ms. Vaughn's disqualification.

These finding of fact and conclusions of law dispose of the liability issues in this case. The question of relief remains. The Court would like submissions from the parties covering the following questions, together with any other issue the parties believe should be addressed: (1) Should Ms. Vaughn be immediately reinstated as a sealex machine operator, or should she simply be declared eligible to bid, under the company's seniority system, on the next job opening in that category? (2) If Ms. Vaughn is reinstated as a sealex machine operator, should the company be required to institute objective performance criteria by which her fitness to retain the job can be assessed? (3) What amount of money will compensate Ms. Vaughn for the difference in pay she has actually received, and the pay she would have received had she not been disqualified as a sealex operator in 1971? (4) What prospective equitable relief should the Court order?

Plaintiffs should file their memorandum on or before May 20, 1979, and defendant should reply on or before June 1, 1979.

IT IS SO ORDERED this 9th day of May, 1979.

/s/ Richard S. Arnold  
RICHARD S. ARNOLD,  
United States District Judge.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

(Title Omitted In Printing)

**ORDER**

The motion of defendant Westinghouse under Fed. R. Civ. P. 59(a)(2) for amended findings of fact and conclusions of law is denied.

This Court's opinion of May 9, 1979, did not place upon defendant the burden of showing that its reason for disqualifying the plaintiff Vaughn was not pretextual. The opinion is therefore fully obedient to the teaching of *Board of Trustees of Keene State College v. Sweeney*, \_\_\_ U.S. \_\_\_, 18 FEP Cases 520 (November 13, 1978). Defendant simply failed to articulate a legitimate, nondiscriminatory reason for Ms. Vaughn's disqualification.

On May 18, 1979, plaintiffs filed a memorandum discussing the appropriate remedy to be included in the judgment. The Court expects defendant's reply on or before June 1, 1979, as indicated in the opinion of May 9, 1979. This memorandum should address the questions posed on page 14 of the opinion.

IT IS SO ORDERED this 23d day of May, 1979.

/s/ Richard S. Arnold  
 RICHARD S. ARNOLD,  
 United States District Judge.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF ARKANSAS  
 WESTERN DIVISION

Christine Vaughn and  
 Marion Gee,

Plaintiffs,

V.

NO. LR-74-C-215

Westinghouse Electric Corp.; International  
 Brotherhood of Electrical Workers, AFL-CIO,  
 Local 1136; and International Brotherhood of  
 Electrical Workers,

Defendants,

and



Glenda Crutcher,

Plaintiff,

V.

NO. LR-76-C-196

Westinghouse Electric Corp.,

Defendant.

*SUPPLEMENTAL FINDINGS OF FACT AND  
CONCLUSIONS OF LAW WITH RESPECT TO RELIEF*

The Court has before it plaintiffs' Memorandum in Support of the Court's Findings as to Relief, filed May 18, 1979, and defendants' Response to Relief Requested on Behalf of Plaintiff Vaughn, filed June 1, 1979. These memoranda concern the question of what relief should be included in this Court's final judgment.

The Court is not persuaded that Ms. Vaughn, the prevailing plaintiff, should be immediately reinstated as a sealex machine operator. She should and will be declared immediately eligible to bid on the next available sealex job, but to order her immediate reinstatement would violate the lawful seniority system including the governing collective-bargaining agreement. It would also displace some innocent employees who are not parties to this case and have had no notice that their rights or status might be affected. Ms. Vaughn will therefore be declared immediately eligible to bid on the next available sealex job. When such a job does become available, her bid will be evaluated according to the seniority system, which has been uniformly and lawfully applied.

There is something to be said for objective performance criteria, and the defendant could perhaps avoid some legal difficulties in the future if it adopted such criteria for evaluation of employees. This Court, however, is not going to impose such an obligation as part of its judgment. The Court has neither the inclination nor the talent to involve itself in management decisions of this nature. Such objec-

tive statistical criteria for job performance, though they no doubt could be devised, would inevitably present difficult questions of application to individual cases, unless they are to be mechanically applied in every instance, without regard to the circumstances of individual employees. The Court is not persuaded that the imposition of such a requirement is necessary to vindicate the statute.

Ms. Vaughn should receive back pay in the amount of \$1,696.25, the total difference in her pay between April 19, 1971, the date of her unlawful disqualification, and May 30, 1971. Defendant argues that she failed in her duty to mitigate damages, but the Court does not agree. It is true that Ms. Vaughn could have bid on another labor grade four job six months after her disqualification as a sealex machine operator. It is also true that she stated in 1976 that there were no particular higher-paying jobs at the plant for which she would like to be trained. In addition, on January 1, 1979, Ms. Vaughn was shown a company record that appeared to list her as a qualified sealex machine operator, but took no steps to bid on such a position after seeing this record.

None of these events cuts off her entitlement to backpay. She was unlawfully disqualified as a sealex machine operator, a job that she wanted, and she did not become again qualified for this position until this Court's ruling. The January 1, 1979, company record is said by the company to be a mistake, and if Ms. Vaughn had attempted to use it in bidding for a sealex machine operator's job, she would undoubtedly have been met with this reply. If the company had come to her and told her unequivocally that she was eligible to bid on a sealex machine operator's position, and if she had then declined to bid, the defendant would have a point, but that is not what happened. The judgment will therefore contain an award in Ms. Vaughn's favor of \$1,696.25, as noted above. In addition, backpay will continue to run in her favor until she is given an opportunity to bid on a sealex machine operator's job and is awarded the job, this relief being necessary to make her whole.



The judgment will also contain an injunction forbidding the defendant from discriminating against any employees in respect of pay, conditions of employment, criteria for demotion, promotion, or disqualification, and the like, on the basis of race. The finding of violation in Ms. Vaughn's favor is an ample basis for such an injunction, especially in view of the prima facie case of plant-wide discriminatory practice set forth in this Court's opinion filed May 10, 1979.

Judgment is being entered in accordance with this opinion.

IT IS SO ORDERED this 12th day of June, 1979.

/s/ Richard S. Arnold  
 RICHARD S. ARNOLD,  
 United States District Judge.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF ARKANSAS  
 WESTERN DIVISION

Christine Vaughn and  
 Marion Gee,

Plaintiffs,

V. NO. LR-74-C-215

Westinghouse Electric Corp.; International  
 Brotherhood of Electrical Workers, AFL-CIO,  
 Local 1136; and International Brotherhood of  
 Electrical Workers,

Defendants,

and

Glenda Crutcher,

Plaintiff,

V. NO. LR-76-C-196

Westinghouse Electric Corp.,

Defendant.

*JUDGMENT*

This case having come on for trial to the Court on April 24, 25, 26, 27, and 30, 1979; all parties having rested; this Court having filed its opinion dated May 10, 1979, containing findings of fact and conclusions of law; the defendants' motion under Fed. R. Civ. P. 59(a) (2) for amended findings of fact and conclusions of law having been denied by order dated May 23, 1979; this Court having made its supplemental findings of fact and conclusions of law with respect to relief in an opinion dated June 12th, 1979; and the Court being well and sufficiently advised in the premises,

It is by the Court this 12th day of June, 1979, CONSIDERED, ORDERED, ADJUDGED, and DECREED:

1. That the complaints of Marion Gee and Glenda Crutcher be, and they are hereby, dismissed with prejudice.
2. That the plaintiff Christine Vaughn have and recover of and from the defendant Westinghouse Electric Corporation judgment in the amount of \$1,696.25, representing backpay to and including May 30, 1979.
3. That the defendant Westinghouse Electric Corporation be, and it is hereby, ordered and directed to permit the plaintiff Vaughn to bid on the next available sealex machine operator's jobs under the terms of its collective-bargaining agreement, her bid to be evaluated on the basis of defendant's lawful seniority system.
4. That plaintiff Vaughn have and recover judgment of and from the defendant Westinghouse Electric Corporation in whatever additional amount may be appropriate to make her whole for losses incurred between June 1, 1979, and the date she receives a sealex machine operator's job, this amount to be computed in accordance with submissions of the parties to be made at the appropriate time.

5. That the defendant Westinghouse Electric Corporation, its agents, servants, and employees, be, and they are hereby, enjoined and restrained from failing or refusing to hire, from discharging, and from otherwise discriminating against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, including promotion, demotion, and disqualification from particular jobs, because of such individual's race or color.

6. That in addition to the monetary award made herein, plaintiff have and recover judgment of and from the defendant Westinghouse Electric Corporation in the amount of her costs expended in this action, all monetary awards to bear interest at the rate of ten per centum per annum from and after the date of the entry of this judgment (except the award to be computed in the future under paragraph 4 of this judgment), but with no addition for prejudgment interest, since the amount of defendant's liability could not be reasonably ascertained until this Court had ruled.

For all of which let execution issue, at the time and in the manner provided by law.

/s/ Richard S. Arnold  
RICHARD S. ARNOLD,  
United States District Judge.

United States Court of Appeals  
FOR THE EIGHTH CIRCUIT

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No. 79-1561

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Christine Vaughn and Marion  
Gee,

Appellees,

v.

Westinghouse Electric  
Corporation,

Appellant.

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\*  
\* Appeal from the United  
\* States District Court  
\* for the Eastern District  
\* of Arkansas  
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Submitted: February 12, 1980

Filed: April 23, 1980

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Before GIBSON, Senior Circuit Judge, HEANEY and  
STEPHENSON, Circuit Judges.

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STEPHENSON, Circuit Judge.

This is an appeal by defendant-appellant, Westinghouse Electric Corporation (Westinghouse), from the district court's<sup>1</sup> finding of racial discrimination by Westinghouse against plaintiff-appellee, Christine Vaughn. The district court held Vaughn prevailed on her claim of disparate treatment because of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* On appeal Westinghouse alleges (1) the district court misapplied the appropriate burden of proof standards and (2) the district court's factual findings are clearly erroneous. We affirm.

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<sup>1</sup> The Honorable Richard S. Arnold, United States District Judge for the Eastern District of Arkansas. Judge Arnold assumed the office of Judge of the United States Court of Appeals for the Eighth Circuit on March 7, 1980.

## I. Background

The district court found against two other plaintiff employees in this case and found against Vaughn on all claims except her claim that Westinghouse was guilty of race discrimination when it disqualified her as a sealex machine operator. *Vaughn v. Westinghouse Electric Corp.*, 471 F.Supp. 281 (E.D. Ark. 1979). Neither Vaughn nor the other plaintiffs have filed a cross-appeal concerning these findings. Therefore, the only issue before us is whether the district court properly found Westinghouse had discriminated against Vaughn because of her race in disqualifying her as a sealex machine operator.

Vaughn, a black, was hired by Westinghouse on July 13, 1970, as a sealex machine operator, labor grade 4, at \$2.20 per hour. On November 16, 1970, she was transferred to a second shift section under the supervision of O.D. Brazil as a sealex machine operator and was earning \$2.54 per hour. On January 25, 1971, she was changed from second to third shift due to a reduction in force, though she testified she preferred the second shift. She continued as a sealex operator under C.T. Turnage on the third shift and was earning the top wage rate of \$2.69 per hour for sealex operators. On April 19, 1971, she was disqualified as a sealex operator by Turnage and placed on an open labor grade 1 job of bulb-loader-hand earning \$2.45 per hour. She has continued to work at Westinghouse and at the time of trial was working as a packing operator-sleeving, labor grade 3, at the rate of \$5.40 per hour.

At the time Vaughn was transferred from sealex operator on the second shift, Brazil, as her supervisor, completed an employee evaluation form concerning Vaughn's performance. It was dated January 20, 1971, and stated her quality and quantity of production were poor, and that he would not rehire her because of her problems making production. On the other hand, it stated she got along well with others and presented no supervisory problems. Additionally, a form dated January 18, 1971, and signed by both Brazil and Vaughn, stated she had had

previous satisfactory experience as a sealex machine operator under Brazil on the second shift. Thus the district court concluded her work under Brazil did not present serious enough problems to label it unsatisfactory.

Under Turnage's jurisdiction, Vaughn was verbally warned on March 9, 23, 24, 30, and April 15, 1971, that she was having production problems, including what Turnage felt was an inadequate number of lamps sealed, and too many burnt wires. Turnage made notes of these verbal warnings, which were introduced at trial. During his talk with Vaughn on April 15, 1971, he apparently informed her that if she did not improve, he would have to use "stronger disciplinary action." On April 19, 1971, she was disqualified from her job as sealex operator. Vaughn disputed that she had prior warnings of this action, and testified she felt she was disqualified under orders from the front office, and was unsure of the reasons why. Turnage's notes from the meeting indicated it was due to her dislike for the job and the number of burnt wires. The disqualification form noted she could not hold this job in the future and stated that although she got along well with others and had good attendance, he was unable to motivate her and she showed no interest in the job as sealex machine operator.

The district court held that plaintiffs had established a prima facie case of racial discrimination under the rationale of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Vaughn v. Westinghouse Electric Corp.*, *supra*, 471 F.Supp. at 286. It then held that Westinghouse failed to demonstrate proof sufficient to overcome plaintiffs' prima facie case with respect to Vaughn's disqualification. *Id.* at 289-90. It awarded Vaughn back pay of \$1,696.25, to continue to run in her favor until she was given an opportunity to bid on a sealex machine operator job. *Id.* at 291.

## II. Analysis

Under *McDonnell Douglas*, a Title VII case is divided into three phases. First the plaintiff must demonstrate a



prima facie case of racial discrimination. Then the defendant has the burden of "articulating" or "proving" a legitimate non-discriminatory reason for its action. If this is done, plaintiff is afforded an opportunity to show that the proffered reason is a pretext for what is in fact illegal discrimination. Clearly the burden on the defendant is one of production; the ultimate burden of persuading the factfinder that there has been illegal discrimination resides always with the plaintiff. This court has recently clarified its understanding of the order and allocation of proof in a disparate treatment situation, *See, Kirby v. Colony Furniture Co.*, No. 78-1808, slip op. at 9-11 (8th Cir., Jan. 8, 1980).

Westinghouse expresses some dissatisfaction with the district court's finding that the plaintiffs demonstrated a prima facie case but does not appeal from that portion of the lower court's decision.

The requirements for demonstrating a prima facie case of disparate treatment were stated in *McDonnell Douglas* to be:

- (i) that [the employee] belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 802.

The Supreme Court noted that the proof required to establish a prima facie case will necessarily vary in different factual situations. *Id.* at 802 n.13. In analyzing the case the district court applied the *McDonnell Douglas* approach to the disqualification situation. It found a prima facie case to be demonstrated because (1) Vaughn belonged to a racial minority; (2) she was employed as a sealex operator having been originally qualified; (3) she was dis-



qualified; and (4) following the disqualification Westinghouse employed another person (in fact a white person) to occupy her former position. The district court relied on statistics indicating disparate treatment in the employment of blacks at the Little Rock plant, *see Vaughn v. Westinghouse Electric Corp.*, *supra*, 471 F.Supp. 284-85; on the testimony of the parties; and on the specifically credited testimony of a plant worker, Wilma Donley, who testified to individual instances of discriminatory treatment. *Id.* at 285-86.

Having contended the plaintiffs have demonstrated a prima facie case, the first contention of Westinghouse on appeal is that the district court applied an incorrect standard to defendant's burden in response to the prima facie case. The burden placed on the employer to meet plaintiffs' prima facie case under the *McDonnell Douglas* analysis was further explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978). In *Furnco*, the Court stated:

When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. \* \* \* To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S., at 802.

*Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 577-78. The Court further defined "articulating some legitimate, nondiscriminatory reason" in *Sweeney*. In that case the court of appeals had stated *McDonnell Douglas* required defendant to prove absence of discriminatory motive. The Supreme Court vacated and remanded for reconsideration in light of *Furnco*, noting that "articulating

some legitimate, nondiscriminatory reason" did not require proof of the absence of discriminatory motive.

Westinghouse contends that there is language in the district court opinion which is similar to that disapproved in *Sweeney*. The district court at one point stated it was "not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons." *Vaughn v. Westinghouse Electric Corp.*, *supra*, 471 F.Supp. at 289-90. The court also concluded:

In short, this is a case where the *McDonnell Douglas* rules as to burden of proof are dispositive. Defendant's position is by no means without support, but it has simply failed to persuade this Court that its proof is sufficient to overcome plaintiff's prima facie case with respect to Ms. Vaughn's disqualification.

*Id.* at 290.

The district court articulated the correct standard at one point in its opinion,<sup>2</sup> and clearly the standard it applied differs from that prohibited in *Sweeney*. Nevertheless we believe it could be interpreted as contrary to the teachings of that opinion. We are persuaded, however, that any doubt about whether the district court applied the appropriate test was resolved in its unpublished order of May 23, 1979. That order denied a motion by Westinghouse for amended findings of fact and conclusions of law and clarified the test the court had applied:

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<sup>2</sup>"Under *McDonnell Douglas*, the burden then shifts to the defendant to show that the personnel actions taken were based upon some legitimate, nondiscriminatory reason." *Vaughn v. Westinghouse Elec. Corp.*, 471 F.Supp. 281, 286 (E.D. Ark. 1979).

This Court's opinion of May 9, 1979, did not place upon defendant the burden of showing that its reason for disqualifying the plaintiff Vaughn was not pretextual. The opinion is therefore fully obedient to the teaching of *Board of Trustees of Keene State College v. Sweeney*, [439 U.S. 29 (1978)]. Defendant simply failed to articulate a legitimate, non-discriminatory reason for Ms. Vaughn's disqualification.

*Vaughn v. Westinghouse Electric Corp.*, No. LR-74-C-215 (E.D. Ark., May 23, 1979) (order). This clearly is an application of the proper test.

The issue now before us is whether the district court's conclusion that Westinghouse failed to articulate a legitimate, nondiscriminatory reason for Vaughn's disqualification is clearly erroneous.

Westinghouse states its legitimate reason for disqualifying Vaughn was "her immediate supervisor's evaluation over a thirty day period that her poor productivity, excessive material waste, and her expressed dislike of a sealex operator's job rendered her unqualified to continue in the position."<sup>3</sup>

We equate the requirement of "articulating a legitimate, nondiscriminatory reason" with "proving the employment decision is based on a legitimate consideration." *Furnco* uses these phrases interchangeably, and the Court in *Sweeney* stated "words such as 'articulate,' 'show,' and 'prove,' may have more or less

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<sup>3</sup> Brief of appellant at 24. This is similar to the reasons stated in Turnage's note of the April 19, 1971, meeting between Turnage and Vaughn. The note states Vaughn was disqualified "due to her obvious dislike for her job, the number of operator burned wires and the fact they were no better after repeated talks and warnings, and her production which had been unsatisfactory and getting no better."

similar meanings depending upon the context in which they are used." *Board of Trustees v. Sweeney, supra*, 439 U.S. at 25.

Therefore, while the burden of persuasion for demonstrating discrimination remains with the employee, the burden of producing evidence of a legitimate reason for the employment practice shifts to the employer. The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually. *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255-56 (5th Cir. 1977). *Accord Silberhorn v. General Iron Works Co.*, 584 F.2d 970 (10th Cir. 1978); *Jones v. Texas Air National Guard*, 584 F.2d 104 (5th Cir. 1978); *Whiteside v. Gill*, 580 F.2d 134 (5th Cir. 1978). These cases do not alter the fact that the ultimate burden of persuasion remains with Vaughn and simply requires Westinghouse to prove the legitimacy of its articulated reason by a preponderance of the evidence. See generally *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976); *Lombard v. School District*, 463 F.Supp. 566, 571 (W.D. Penn. 1978). Cf. *Furnco Construction Co. v. Waters, supra*, 438 U.S. at 578 (stating the burden on the employer is to demonstrate "proof of a justification which is reasonably related to the achievement of some legitimate goal"). Clearly this is obedient to *Sweeney* and does not require proof of the absence of discriminatory motive. *Board of Trustees v. Sweeney, supra*, 439 U.S. at 25.

The district court concluded that Westinghouse had not articulated a legitimate reason for the disqualification. It noted the stated reason was poor production, but observed a company form dated January 18, 1971, and signed by both Vaughn and her supervisor, Brazil, indicated satisfactory performance on the second shift, and a bump sheet dated December 8, 1978, indicated prior satisfactory performance during the second and third shifts as a sealex operator. The district court found her to be cooperative and not a discipline problem and noted she received increases in

pay as a sealex operator and in fact was being paid the top rate at the time of her disqualification. Vaughn also contested the testimony that she had been made aware of the gravity of her production problems. Turnage stated both production quantity and quality were poor, and below other shifts, but the company had not articulated objective standards indicating what satisfactory production levels were. The district court concluded that although Vaughn "unquestionably had problems with production, \* \* \* the absence of objective production criteria makes it difficult for the Court to hold these problems were serious enough to meet the burden imposed on the defendant by law." *Vaughn v. Westinghouse Electric Corp.*, *supra*, 471 F.Supp. at 290.

We interpret the district court's decision, as clarified by its May 23, 1979, order, to state that although reasons were articulated, i.e., poor production, given the opposing evidence concerning production and the absence of objective production criteria, Westinghouse failed to demonstrate the legitimacy of its articulated reason by a preponderance. See *Cosby v. United States*, 472 F.Supp. 547, 552-53 (S.D. Ohio 1979). "[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 343 n.24 (1977) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

While in viewing the evidence from the trial we might be of the opinion that Westinghouse articulated a legitimate reason for Vaughn's disqualification, we may not substitute our views for that of the district court. Fed. R. Civ. P. 52(a) provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Applying the standard, we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).



Because the district court concluded Westinghouse failed to meet its burden of production, Vaughn was not required to show that the reasons were pretextual.<sup>4</sup> If the employer cannot "prov[e] that he based his employment decision on a legitimate consideration," then he has failed "[t]o dispel the adverse influence from a prima facie case showing under *McDonnell Douglas*." *Furnco Construction Co. v. Waters*, *supra*, 438 U.S. at 577-78.

The district court's judgment that Vaughn was unlawfully disqualified from her job as sealex machine operator is affirmed.

GIBSON, Senior Circuit Judge, dissenting.

I view the district court's finding that Westinghouse failed to demonstrate the legitimacy of its articulated

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<sup>4</sup> It should be noted that, if required, much of the evidence used by the district court in finding a prima facie case might go to whether the employer's articulated reason is pretextual. *McDonnell Douglas* states the statistical evidence submitted by plaintiffs is helpful in showing pretext. So would testimony of Vaughn and others relating to individual instances of discrimination. Thus the district court in the present case alternatively could have found the reasons articulated by Westinghouse to be legitimate and nondiscriminatory, but, based on the statistical evidence, testimony, and lack of objective production standards, the reasons to be a pretext for discrimination. As noted by the Third Circuit,

[T]here are no hard and fast rules as to what evidence must be considered as constituting a prima facie case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the factfinder that there has been illegal discrimination resides always with the plaintiff. We will thus review the judgment of the district court not with an eye to strict adherence to form, but in order to determine whether the decision on the merits of plaintiff's case is clearly erroneous on the facts, or uncongenial to previously enunciated legal standards.

*Whack v. Peabody & Wind Engineering Co.*, 595 F.2d 190, 193 (3rd Cir. 1979) (footnotes omitted).

reason for disqualifying Vaughn to be clearly erroneous in light of the evidence produced at trial, and I respectfully dissent. The evidence clearly demonstrates that Westinghouse met its burden by a preponderance of the evidence that a legitimate reason for the disqualification existed.

In the district court, Vaughn claimed that she was disqualified from the sealex position, declared surplus from other jobs, denied promotional opportunities, issued a written warning for being repeatedly late for work, and verbally abused and harassed by her supervisors, all on account of her race. With regard to these claims the district court found:

With the exception of her disqualification as a sealex operator, all of Ms. Vaughn's changes in jobs were occasioned either by her own request or by a bona fide reduction in force, having the result under Westinghouse's legal seniority system of "bumping" her to another job. In addition, there were attendance problems with Ms. Vaughn which are amply documented in the company's records. There is no evidence that she was verbally abused or harassed, on account of race or for any other reason. With respect to these claims, the Court holds that the defendant has borne its burden.

The result is otherwise, however, with regard to Ms. Vaughn's claim that she was disqualified as a sealex operator on account of her race. \* \* \* As noted above, on January 25, 1971, she was transferred from second to third shift because of a reduction in force. She had been a sealex operator on second shift under O.D. Brazil, and transferred to the same job on third shift under C.T. Turnage. *Mr. Brazil's employee evaluation form with regard to Ms. Vaughn, dated January 20, 1971, states that her quality and quantity of work were poor and that she could not make production. Mr. Brazil also stated that he would not rehire Ms. Vaughn. On the other*



hand, she got along well with others, and Mr. Brazil had no supervisory problems with her. *Most important of all, a form dated January 18, 1971, signed by both Ms. Vaughn and Mr. Brazil, stated that she had had "previous satisfactory experience" as a sealex machine operator on the second shift.* The Court must conclude that, although Mr. Brazil had some problems with her, he did not consider them serious enough to label her work "unsatisfactory." She then began work under Mr. Turnage's jurisdiction. On March 9, 23, 24, and 30, and on April 15, 1971, Mr. Turnage warned Ms. Vaughn about production problems, including what he believed to be too many burned wires. Finally, on April 19, 1971, Mr. Turnage disqualified her, stating that although she got along well with others, he had been unable to motivate her, and believed she had no interest in the job of sealex machine operator. Her disqualification form stated that she would not be eligible to hold this job in the future.

*Vaughn v. Westinghouse Electric Corp.*, 471 F.Supp. 281, 289 (E.D. Ark. 1979) (emphasis added).

A review of these findings reveals only one major fact that may dispute Westinghouse's assertions that Vaughn was disqualified for production problems.<sup>1</sup> Vaughn and one of her supervisors, Brazil, signed a form on January 18, 1971, stating that Vaughn had "previous satisfactory experience" as a sealex machine operator during the second shift (3:00 p.m. to 11:00 p.m.). The district Court, however, also found that Brazil did have problems with Vaughn, as was evidenced by his employee evaluation of her, which he made two days *after* the form was signed. Brazil's evalua-

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<sup>1</sup> The district court also noted the existence of a "bump sheet" dated December 8, 1975, representing the state of the company's records as of January 1, 1979, that indicated that Vaughn had previously performed the sealex machine operator's job satisfactorily. 471 F.Supp. at 290. Westinghouse produced testimony stating that this report was a clerical error.

tion found Vaughn's quality and quantity of work poor and stated that "she could not make production." After Vaughn's legitimate transfer to the "graveyard" shift (11:00 p.m. to 7:00 a.m.), her new supervisor, Turnage, experienced similar production problems. Three months later, Turnage, after warning Vaughn, disqualified her from the sealex position. Vaughn was not dismissed, however, by Westinghouse. She was transferred to a job of bulb loading which paid twenty-four cents less an hour than the sealex position. These facts are devoid of any connotation whatsoever of racial discrimination. The only discrimination against Vaughn was because of her poor and sloppy work. The Civil Rights Act of 1964 is not thought to have been passed to preserve sinecures for people, regardless of their race, who do not want to perform reasonably satisfactory work. Vaughn's productivity record was the worst of any of the operators. The Act here is being utilized as a shield to protect and reward substandard performance.

These facts even when viewed in a light most favorable to Vaughn, only demonstrate that the supervisor, Turnage, may have had a higher production standard for his shift employees than did Vaughn's previous supervisor, Brazil. Turnage and Westinghouse had a legitimate, nondiscriminatory reason for disqualifying Vaughn unless a uniform production standard among shifts or supervisors is a prerequisite to a legitimate disqualification.<sup>2</sup> I do not believe that Title VII of the Civil Rights Act of 1964 ever envisaged requiring uniform production standards or mandating how businesses should produce their products. This requirement would result in government supervision

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<sup>2</sup> The application of such a prerequisite was suggested in the district court's opinion. "She [Vaughn] unquestionably had problems with production, but the absence of objective production criteria makes it difficult for the Court to hold that these problems were serious enough to meet the burden imposed on the defendant by law." 471 F.Supp. at 290.

of each and every stage of the production process.<sup>3</sup> In addition, the paperwork involved in developing and maintaining objective production standards would be titanic. Perhaps this would be yet another contributing factor in the comparatively low productivity suffered by our country in recent years.

I would reverse and remand to the district court in order to afford Vaughn an opportunity to show that Westinghouse's reason for disqualification is a pretext for illegal discrimination.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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<sup>3</sup> A number of interesting questions arise if such a requirement were imposed. Should a uniform requirement be applied to all workers on a particular shift, or among shifts, or among plants? Note that if a uniform requirement were imposed on a particular shift, Vaughn would have to have been disqualified by Brazil ("she could not make production"); if she were not, any other employee who could make out a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), could prevail in a civil rights action against Westinghouse since Westinghouse would be unable to rebut the prima facie case.

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

79-1561

September Term, 1979

Christine Vaughn, et al.,

Appellees,

v.

Westinghouse Electric Corporation,

Appellant.

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)  
) Appeal from the United  
) States District Court for  
) the Eastern District of  
) A r k a n s a s  
)  
)

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judge Bright and Judge Henley would grant the petition for rehearing en banc. Judge Arnold took no part in the decision.

May 23, 1980

SUPREME COURT OF THE UNITED STATES

No. 80-276

Westinghouse Electric Corporation,

Petitioner,

v.

Christine Vaughn and Marion Gee

ON WRIT OF CERTIORARI to the United States Court  
of Appeals for the Eighth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. \_\_\_\_ (1981).

IT IS FURTHER ORDERED that the petitioner, Westinghouse Electric Corporation, recover from Christine Vaughn and Marion Gee Two Hundred Dollars (\$200.00) for its costs herein expended.

March 9, 1981

Clerk's costs: \$200.00

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 79-1561

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Christine Vaughn and  
Marion Gee,

Appellees,

v.

Westinghouse Electric  
Corporation,

Appellant.

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Appeal from the United  
States District Court  
for the Eastern District  
of Arkansas

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Filed: April 21, 1981

Before HEANEY, Circuit Judge, GIBSON, Senior Circuit Judge, and STEPHENSON, Circuit Judge

ORDER

The judgment of this court having been vacated for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. \_\_\_\_ (1981),

IT IS ORDERED that this cause is remanded to the United States District Court for the Eastern District of Arkansas for consideration and proceedings in accord with the above-cited case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

CHRISTINE VAUGHN,

PLAINTIFF,

v.

No. LR-74-C-215

WESTINGHOUSE ELECTRIC CORP.,

DEFENDANT.

OPINION ON ATTORNEYS' FEES

On September 30, 1981, this Court filed its opinion on remand, finding that defendant had disqualified the plaintiff Christine Vaughn as a sealex operator in part because of her race. *Vaughn v. Westinghouse Electric Corp.*, \_\_\_\_ F. Supp. \_\_\_\_ (E.D. Ark. 1981). The Court directed counsel for

plaintiff to file, on or before October 15, 1981, a memorandum, supported by affidavit, setting forth her position as to back pay and attorneys' fees. Defendant was given until October 30, 1981, to reply. The times for both sides' submissions were subsequently extended, and the last filing was made on November 4, 1981. The Court has already held that plaintiff is entitled to an award of attorneys' fees. The question to be decided is the amount.

### I.

Before discussing the fee award, it is appropriate to deal with the question of back pay. The sum of \$1,696.25 has already been awarded, representing back pay to and including May 30, 1979. Plaintiff states (Memorandum of Mr. Crutcher, October 14, 1981, p. 2) that "[c]ounsel for defendant has agreed to provide . . . information" as to back-pay entitlement since that first computation was made. No such information has been provided. The Court is therefore not in a position to make a specific monetary award for back pay that has accrued since May 30, 1979. The judgment will therefore simply award plaintiff \$1,696.25, plus interest at the rate of ten per centum per annum from and after May 30, 1979, until payment is made. The judgment will also recite that plaintiff is entitled to recover an additional sum equal to the difference between her actual earnings at Westinghouse, and what she would have earned as a sealex operator. This amount of money will continue to run until plaintiff is reinstated as a sealex operator, or until she is offered reinstatement and refuses it. The fact that the amount of back pay, to a degree, will thus remain open to computation will not impair the finality of this Court's judgment, in my opinion. There will almost always be some such loose end in cases awarding back pay.<sup>1</sup>

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<sup>1</sup> Defendant's Memorandum of November 4, 1981, p. 9, seems to say that plaintiff has already been offered and has declined the sealex position. If so, defendant may file a timely post-judgment motion for amendment of these findings and modification of the judgment.



## II.

Defendant first asserts that only time spent by plaintiff's counsel after remand from the Supreme Court and the Court of Appeals should be considered. It claims that three categories of services, for various reasons, cannot now be considered for compensation. The contested categories are (1) services rendered by counsel for plaintiff before this Court's first judgment was entered in 1979; (2) services rendered by counsel for plaintiff-appellee on the defendant's unsuccessful appeal to the Court of Appeals; and (3) services rendered by counsel for plaintiff-respondent in attempting to defeat defendant's partially successful petition for certiorari in the Supreme Court. For the reasons that follow, this Court is of the opinion that all of these contested categories of legal services remain compensable.

## A.

Westinghouse first points out that counsel for plaintiff did not ask this Court for an award of attorney's fees for services rendered in this Court until many months had elapsed after the entry of judgment in May of 1979. In fact, no request for fees, other than a *pro forma* prayer for relief in the complaint, was made until after this Court's judgment had been affirmed by the Court of Appeals. At that point defendant objected to any award, asserting that the request was untimely because (1) it had not been made within ten days of the entry of judgment, as required by Fed. R. Civ. P. 59 for motions to alter or amend a judgment, and (2) it was not accompanied by any statement of reasons sufficient to qualify it for extraordinary relief under Fed. R. Civ. P. 60(b). Counsel for plaintiff countered with an affidavit to the effect that one of this Court's law clerks had advised him that it was all right to wait to file his request for an allowance of fees. The law clerk involved filed his own affidavit, stating that no such advice had been given, whereupon this Court, feeling that it would give at least the appearance of impropriety for it to sit in judgment on the credibility of one of

its own employees, recused itself. The case was then reassigned to another judge for a ruling on the then-pending question of attorneys' fees. In the meantime, however, defendant was prosecuting its petition for certiorari in the Supreme Court, which petition was ultimately granted. The Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration. The Court of Appeals, in turn, as recounted in this Court's previous opinion on remand, remanded the case to this Court. At that point the undersigned judge took charge of the case again, believing that the timeliness issue had become moot, thus removing any necessity for me to decide whether to take my law clerk's word against counsel's.

The Court remains persuaded that the timeliness issue asserted by defendant is no longer in the case. The Supreme Court has vacated the judgment of the Court of Appeals affirming this Court's original judgment, and the order of the Court of Appeals in effect does the same thing to this Court's May, 1979 decision. Thus, there will be no final judgment until this Court again enters judgment as a result of the proceedings on remand. Even if defendant were right in its contention that the request for attorney's fees must be made within the time prescribed in Rule 59, the request in the instant case, which has been made before the entry of judgment on remand, would not be untimely. In addition, the law in this Circuit has now become clear that the Rule 59 ten-day time limit does not apply to requests for attorneys' fees in this kind of case. In *Obin v. District No. 9 of the International Association of Machinists and Aerospace Workers*, 651F.2d 574 (8th Cir. 1981), the Court of Appeals, disagreeing with the First Circuit's ruling in *White v. New Hampshire Department of Employment Security*, 629 F.2d 697 (1st Cir. 1980), *cert. granted*, 101 S.Ct. 2313 (1981), held that attorneys' fees are allowed as part of the award of costs to a prevailing party. Accordingly, the rule in this Circuit is that the Rule 59 time limit does not apply to such requests, and that, in fact, there is no fixed time limit on an application for an award of attorneys' fees. This Court is bound by

*Obin*. Defendant's position that this Court should not at this time consider an award of fees for services rendered before its first judgment was entered must therefore be rejected.

B.

The next category of fees contested relates to services rendered on the appeal from this Court to the Court of Appeals. The opinion of the Court of Appeals does not mention the question of fees, and the mandate makes an allowance of costs without referring to the subject. Counsel for plaintiff claim that they asked for fees in their brief in the Court of Appeals. Defendant counters that, if this is true, the opinion of the Court of Appeals, by not mentioning the subject, must be taken to have denied plaintiff's request. Defendant also notes that, in general, it is for the Court of Appeals, not a district court, to award fees for services rendered by counsel on appeal. See *Cleverly v. Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979).

The Court is not persuaded by these arguments. At the time of the Court of Appeals' opinion in this case, there was a good deal of confusion as to the proper procedure and time limits applicable to requests for attorneys' fees. Whether the judges who sat on the appeal ever consciously considered the question of attorneys' fees, cannot now be determined, but it seems extremely unlikely to me that they actually considered the question and decided to make no award. Probably they did not actively consider the issue at all, and counsel for plaintiff can properly be faulted for not specifically bringing the matter to the attention of the Court of Appeals by way of post-judgment affidavit. That is the presently customary and preferred procedure. In the present posture of the case, though, either this Court must make an award of fees for counsel's successful defense of defendant's appeal, or no award will be made, because the Court of Appeals' mandate has long since come down (for the second time), and that Court no longer has jurisdiction of the case. It would not be possible for counsel to apply now

to the Court of Appeals for an allowance of fees for services rendered on the appeal during 1979 and 1980. The Court believes that the remedial purposes of Title VII would best be served by considering what award of fees is reasonable and proper, instead of rejecting the request altogether. This treatment of the matter seems more in accord with the spirit of the *Obin* opinion. The result is one with which this Court is not completely comfortable, but it seems to be the best solution now available.

### C.

Finally, defendant asserts that this Court should not award any fees for services performed by counsel for plaintiff in the Supreme Court. In that Court, of course, if there was a prevailing party, it was defendant, because defendant's petition for certiorari was granted, and the judgment of the Court of Appeals was vacated. Defendant points out, in addition, that the mandate of the Supreme Court awards to it \$200 in costs, another indication that it was regarded by the Supreme Court as the prevailing party on the petition for certiorari.<sup>2</sup> Again, this Court must disagree with defendant, though its position is not wholly without merit. The question of who is the "prevailing party" should be determined as to a case as a whole, not as to individual segments of the case. The Supreme Court's order granting certiorari and remanding for further consideration was not the end of the war, but only of one battle. That defendant prevailed in this battle does not mean that plaintiff is not the prevailing party in the war as a whole. This Court, in obedience to the Supreme Court's mandate, has reconsidered its previous opinion and has, for reasons already given, reinstated a judgment in favor of plaintiff. She is therefore the prevailing party, whatever may have been the intermediate stages of the litigation. It is of some moment,

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<sup>2</sup> Defendant says this \$200 has never been paid. It will be deducted from the award for costs and expenses computed later in this opinion.

in addition, that the Supreme Court's order did not reverse the judgment of the Court of Appeals, but merely vacated it and remanded the case for reconsideration in light of an intervening Supreme Court opinion. Again, there are some practical difficulties with this solution. This Court, for example, is hardly in a position to judge the quality of services rendered before the Supreme Court. On the other hand, the Supreme Court, like the Court of Appeals, has long since lost jurisdiction of the case, and there is no reasonably possible means for counsel for plaintiff to apply to the Supreme Court for an award of fees, at this point. The Supreme Court would probably choose not to involve itself in that kind of fact-finding function, in any case. On the whole, the better solution seems to be for this Court to make an award of fees for services rendered on behalf of plaintiff in the Supreme Court. These services appear reasonable in amount, so far as the time expended is concerned, and the Court does not understand defendant to contend to the contrary. Defendant's position that this Court should not consider an award of fees for services rendered in the Supreme Court is therefore rejected.

### III.

I turn now to a consideration of the specific requests for reimbursement made by each of the three lawyers for the plaintiff who have filed affidavits, Zimmerly Crutcher, Jr., John Walker, and Clyde Murphy. To begin with, the Court does not agree that there has been any duplication in these attorneys' services. This litigation, which was commenced with the filing of a charge in 1972 before the Equal Employment Opportunities Commission, has been protracted and difficult. Plaintiff has been faced with tenacious and resourceful opposition at every stage of the case. Yet, during most of the trial, only one lawyer for plaintiff was in the courtroom. Defendant has been represented by a number of lawyers throughout the course of the litigation, and plaintiff should not be penalized for seeking similar assistance.



Fee requests of this kind are to be judged according to familiar principles. It is the duty of the Court first to fix a reasonable hourly rate for the services of each of the lawyers, and then to multiply these hourly rates by the numbers of hours that the Court finds have been reasonably spent on the prevailing plaintiff's case. The resulting product is "presumptively a base figure to be awarded by the court." *Taylor v. Jones*, 495 F.Supp. 1285, 1297 (E.D. Ark. 1980), *aff'd*, 653 F.2d 1193, 1205-06 (8th Cir. 1981). The resulting figure, however, is not to be invariably awarded. It is still incumbent on the Court to consider the various factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which has been followed in this Circuit. See *Taylor v. Jones*, *supra*, 653 F.2d at 1205; *Taylor v. Teletype Corp.*, 492 F.Supp. 405, 406 (E.D. Ark. 1980), *aff'd in part on other issues*, 648 F.2d 1129 (8th Cir.), *cert. denied*, 50 U.S.L. Week 3352 (U.S. November 2, 1981) (No. 81-512).

It is first appropriate to address the allowable hourly rate for each of the attorneys. Mr. Crutcher requests compensation at the rate of \$75 an hour. Mr. Crutcher has conducted himself competently and effectively, and the Court believes, based on its knowledge of the abilities of lawyers of similar experience in this area, that a rate of \$45 an hour in court and \$40 out of court would be appropriate. Mr. Walker seeks reimbursement at the rate of \$125 an hour for partners's time, and \$90 an hour for associates' time. If all of the services rendered in this case were being rendered in 1981, the Court could agree that \$125 an hour would be an appropriate rate for Mr. Walker, because his abilities and experience place him in the first rank of the bar. Since many of the services were performed years ago, however, the fair rate, in the Court's opinion, would be \$85 an hour in court and \$60 out of court.<sup>3</sup> Mr. Murphy requests reimbursement

<sup>3</sup>In *Taylor v. Jones*, *supra*, 495 F.Supp. at 1297, this Court awarded fees for Mr. Walker's services at the rate of \$75 an hour in court and \$50 out of court. The Court believes that a differential between in-court time and out-of-court time would be made in billing by lawyers of the first rank in the Little Rock area. *Taylor* was decided over a year ago. Rates should be somewhat higher now.

at the rate of \$100 an hour. The Court is not personally acquainted with Mr. Murphy. The brief filed for plaintiff on remand, which the Court understands to be primarily Mr. Murphy's work, evinces a high degree of skill, but Mr. Murphy has been out of law school only six years, and the Court is unwilling to award him a fee in excess of that earned by Mr. Crutcher, who has also been at the bar a relatively short length of time. Mr. Murphy's time will therefore be computed at the rate of \$40 an hour. All of Mr. Murphy's work was out of court.

Mr. Crutcher makes a total request of \$12,450, claiming 166 hours of work at \$75 an hour. It must be recalled, at this point, that there were originally three plaintiffs in this case, only one of whom, Ms. Vaughn, has prevailed. In addition, plaintiffs were unsuccessful on their motion for class certification, and some of the effort of counsel for plaintiff was directed against a union co-defendant, which is no longer in the case. The Court has reviewed Mr. Crutcher's affidavit and finds that only 40 of the 166 hours claimed are properly allocable to time in court. The trial took five days, and eight hours for each day of trial is an ample allowance for this purpose. Of the remaining 126 hours, six hours are applicable exclusively to the class-action question, with respect to which plaintiff did not prevail.<sup>4</sup> Mr. Crutcher's 40 hours in court, at a rate of \$45 an hour, amount to \$1,800. The 120 hours out of court, at a rate of \$40 an hour, amount to \$4,800. The total of these two sums is \$6,600. This figure, however, should be reduced to some extent, because it would be unfair to make Westinghouse pay a fee for services rendered on behalf of losing plaintiffs, or against another party defendant. It is impossible to allocate services with precision, but the Court finds, based upon its examination of each item in the at-finds, based upon its examination of each item in the at-

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<sup>4</sup> Six hours is the Court's estimate of time reasonably necessary to perform the services listed by Mr. Crutcher under dates of February 17, March 1-3, and March 21, 1979, on p. 1 of his affidavit.



torneys' affidavits and on its recollection of the trial and pre-trial proceedings, that about 80% of the services rendered, up to and including the trial of this case, would have been necessary even if there had been only one plaintiff. The \$6,600 figure will therefore be reduced by \$952,<sup>5</sup> producing a fee allowance for Mr. Crutcher of \$5,648.

Mr. Walker asserts by affidavit that his time, and that of certain other lawyers formerly associated with him, amounts to 167.5 hours of partners' time and 23.75 hours of associates' time. Only ten hours of these services, all of it Mr. Walker's personal time, was spent in court. The Court allows a base figure of \$850 for these ten hours of in-court time. Of the remaining 157.5 hours of partners' time claimed, the Court finds, from an inspection of each item listed in Mr. Walker's affidavit, that 40.25 hours are allocable exclusively to the class-action question or to the union co-defendant. The out-of-court time remaining is 117.25 hours, which, at a rate of \$60 an hour, would amount to \$7,035. All of the deductions attributable to services rendered in connection with the class-action question and the co-defendant appear to be composed exclusively of partners' time. For the associates' time of 23.75 hours, all of which was expended out of court, the Court awards \$40 an hour, for a total of \$950. The total base award would be \$8,835, when these three sums are added up, but, for reasons stated above, the Court believes that this award should be further reduced to reflect the fact that some of the time spent is fairly attributable to the non-prevailing plaintiffs. The ap-

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<sup>5</sup> Mr. Crutcher's time up to and including the end of trial was 114 hours, 40 hours in court and 74 hours out of court. At a rate of \$45 an hour in court and \$40 an hour out of court, this time would be worth \$4,760. One-fifth of this amount is \$952.

propriate deduction is \$1,503,<sup>6</sup> and the resulting award of fees to Mr. Walker is \$7,332.

It may be observed at this point that the Court's task would have been greatly aided had Mr. Crutcher's and Mr. Walker's affidavits been more precise. In Mr. Walker's case, the imprecision is excused, at least in part, by the fact that many of the services were rendered before 1976, when the Civil Rights Attorneys' Fees Awards Act was enacted, so there was little reason for time records to be kept for these early services. In the case of both affidavits, however, there are some dates and descriptions of services rendered that do not indicate a specific amount of time expended on the particular date for the particular service listed. Instead, time seems to have been added up for blocks or groups of dates and services. Plaintiff, of course, has the burden of proof on the issue of attorneys' fees, and the Court cannot properly be asked simply to assume that certain kinds of services would require a certain amount of time. The Court has attempted to describe in as much detail as possible the mental process by which the figures that are to be awarded have been reached, but the process inescapably remains inexact to some degree.

In the case of Mr. Murphy's affidavit, however, there is no such imprecision. He lists each date when services were performed, the nature of the services performed on that date, and the amount of time required. A total of 71.71 hours is claimed, which would be a reasonable total for the

---

<sup>6</sup> Mr. Walker's affidavit shows 23.75 associates' hours out of court up through the end of the trial, which would be worth \$950 at \$40 an hour. Partners' time for the same period appears to be 145.5 hours, from which the Court has already deducted 40.25 hours allocable to the class-action issue and the union co-defendant, leaving 105.25 hours, of which 10 are in court and 95.25 out of court. These blocks of time would be worth \$850 (10 x \$85) and \$5,715 (95.25 x \$60) respectively, for a total of \$6,565. The total of associates' time, \$950, and partners' time, \$6,565, up through the end of trial, comes to \$7,515. One-fifth of this amount is \$1,503.

research and drafting for which Mr. Murphy was responsible, but the Court's addition of the numbers contained in his affidavit yields a total of only 68.75 hours. The latter figure will be taken as the proper total, and, when multiplied by \$40, for out-of-court services, yields a total fee award of \$2,750. All of Mr. Murphy's services were rendered either in the Supreme Court or in this Court on remand, so no reduction will be made to take account of other parties or issues.

As to expenses, Mr. Crutcher's affidavit claims a total of \$1,021.25, and no particular item listed by Mr. Crutcher is contested by defendant. The award will include the claimed sum of \$1,021.25 for expenses. Mr. Walker claims \$286 for expenses. Of this amount, the filing fee and Marshal's service, two items totaling \$20, appear to be duplications of costs included in Mr. Crutcher's listing. They will therefore be disallowed. Mr. Walker claims deposition expense of \$200, which defendant suggests is a duplication of a deposition expense listed by Mr. Crutcher, but Mr. Crutcher's deposition expense is different in amount (\$120), so it appears to the Court that two different depositions are involved. Expenses will therefore be allowed in the additional amount of \$266, for a total of \$1,287.25, from which the \$200 unpaid from the Supreme Court will be taken away.

The fact remains that an award of fees in a case such as this cannot be altogether a matter of mathematics. It is still necessary for the Court to review the award in light of the services rendered and the nature of the case, and to apply the various factors listed in *Johnson v. Georgia Highway Express, Inc.*, *supra*. The Court has reviewed these factors and does not believe that any of them should operate either to reduce or increase the awards listed above. Counsel for plaintiff suggest that a multiplier of 20% should be added to take account of results achieved, but the Court cannot agree. This case, as it ended up, was simply an individual claim for a violation of Title VII. No class relief was obtained, nor was any wide-ranging principle established by the

litigation. Defendant, on the other hand, points to the \$1,696.25 awarded in back pay at the time of the entry of this Court's first judgment, and suggests that counsel's fee should be no greater. It is true that one of the factors properly to be considered is the results obtained, including the amount of money recovered for the individual plaintiff. The Court cannot agree, however, that the importance of these cases can be measured exclusively by that standard. Although the amount of money recovered by the plaintiff is small, at least relatively so, the results achieved include her promotion to a better job. They also include a finding that the defendant has violated Title VII, which embodies a policy considered by Congress to be of great importance. The granting of even individual relief in a case of this kind can improve the quality of life for all citizens, and the Court is mindful that plaintiffs in these cases act, in part, as private attorneys general. On the whole, therefore, the amounts listed above as compensation, for the various attorneys' time and expenses are reasonable, and judgment will be entered accordingly.

IT IS SO ORDERED, this 25th day of November, 1981.

/s/ Richard S. Arnold

RICHARD S. ARNOLD,  
United States Circuit Judge,  
Sitting by designation.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) . . . 11-25-81. . . /s/ S. Burns.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

Christine Vaughn,

Plaintiff,

V.

NO. LR-C-74-215

Westinghouse Electric Corp.,

Defendant,

*JUDGMENT*

This cause having been remanded to this Court by the Court of Appeals for further proceedings in accordance with the order and mandate of the Supreme Court of the United States; this Court having filed its additional opinions on remand dated September 30, 1981, and November 25, 1981; and the Court being well and sufficiently advised in the premises,

It is by the Court this 25th day of November, 1981, CONSIDERED, ORDERED, ADJUDGED, and DECREED:

1. That the plaintiff Christine Vaughn have and recover of and from the defendant Westinghouse Electric Corporation judgment in the amount of \$1,696.25, representing back pay to and including May 30, 1979, with interest thereon until paid at the rate of ten per centum per annum.

2. That, in addition to the money judgment awarded in paragraph 1 hereof, the plaintiff Christine Vaughn have and recover of and from the defendant Westinghouse Electric Corporation judgment in the further sum representing the difference between her actual earnings and what she would have earned had she been reinstated as a sealex operator, this sum to be computed for the peroid beginning on June 1, 1979, and ending on the date when plaintiff is either reinstated as a sealex operator, or is offered reinstatement, and refuses it.

3. That the defendant Westinghouse Electric Corporation be, and it is hereby, ordered and directed to permit the plaintiff Vaughn to bid on the next available sealex machine operator's job under the terms of its collective-bargaining agreement, her bid to be evaluated on the basis of defendant's lawful seniority system.

4. That the defendant Westinghouse Electric Corporation, its agents, servants, and employees, be, and they are hereby, enjoined and restrained from failing or refusing to hire, from discharging, or from otherwise discriminating against the plaintiff Christine Vaughn with respect to her compensation, terms, conditions, or privileges of employment, including promotion, demotion, and disqualification from particular jobs, because of her race or color.

5. That the defendant Westinghouse Electric Corporation be, and it is hereby, adjudged and declared to have violated Title VII of the Civil Rights Act of 1964 in its disqualification of plaintiff Christine Vaughn as a sealex operator, all as more fully set forth in this Court's opinion dated September 30, 1981.

6. That plaintiff Christine Vaughn have and recover judgment of and from the defendant Westinghouse Electric Corporation in the amount of her costs and attorneys' fees reasonably expended in this action, this award being more particularly stated as follows: (1) for costs of suit, \$1,087.25; (2) for attorney's fees for Zimmery Crutcher, Jr., Esq., \$5,648; (3) for attorney's fees for John W. Walker, Esq., \$7,332; and (4) for attorney's fees for Clyde E. Murphy, Esq., \$2,750.

7. All of the monetary awards made in this judgment, including the awards of costs and attorney's fees, shall bear interest at the rate of ten per centum per annum from and after the date of entry of this judgment, except the award of back pay already made, which will bear interest from and after May 30, 1979, as hereinbefore provided, and except



the award to be computed in the future under paragraph 2 of this judgment, but with no addition for pre-judgment interest.

For all of which let execution issue, at the time and in the manner provided by law.

/s/ Richard S. Arnold  
RICHARD S. ARNOLD,  
United States District Judge.  
sitting by designation

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

*ORDER*

The Court has before it the motion of defendant for amended findings of fact and judgment, filed December 4, 1981. No opposition to the motion has been filed, and the time for opposition has run.

The motion is granted. The Court finds the facts to be as stated in the affidavit W.T. Hunnicutt, Jr., attached to the memorandum in support of the motion.

An amended judgment is being entered accordingly.

IT IS SO ORDERED this 22nd day of December, 1981.

/s/ Richard S. Arnold  
RICHARD S. ARNOLD,  
United States District Judge.  
sitting by designation



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

Christine Vaughn,

Plaintiff,

V.

CIVIL ACTION NO. LR-C-74-215

Westinghouse Electric Corp.,

Defendant,

*AMENDED JUDGMENT*

Paragraphs 2 and 3 of the judgment entered by this Court on November 25, 1981, are amended to read as follows:

2. That, in addition to the money judgment awarded in paragraph 1 hereof, the plaintiff Christine Vaughn have and recover of and from the defendant Westinghouse Electric Corporation judgment in the further sum of \$29.46, representing back pay for the period beginning June 1, 1979, and ending on October 12, 1979, with interest thereon until paid at the rate of 10 per centum per annum.

3. That the defendant having permitted the plaintiff to bid on an available sealex machine operator's job, defendant is not further obligated to offer said job to plaintiff.

All other portions of the judgment heretofore entered remain in effect.

IT IS SO ORDERED this the 22nd day of December, 1981.

/s/ Richard S. Arnold

RICHARD S. ARNOLD,  
United States District Judge.  
sitting by designation

JUDGMENT  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHT CIRCUIT

No. 82-1123-EA

September Term, 1982

Christine Vaughn, et al,  
Appellees

vs.

Westinghouse Electric Corp.,  
Appellant.

Appeal from the United States District Court for the  
Eastern District of Arkansas.

This appeal from the United States District Court was  
submitted on the record of the said District Court, briefs of  
the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that  
the judgment of the said District Court in this cause be, and  
the same is hereby, affirmed in accordance with the opinion  
of this Court.

March 11, 1983

Total costs of Appellees  
for briefs and for recovery from  
Appellant:

\$57.00

(Please pay costs directly to parties involved)

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 82-1123

September Term, 1982

Christine Vaughn, and Marian Gee,	)	
Appellees,	)	
	)	Appeal from the United
v.	)	States District Court for
	)	the Eastern District of
Westinghouse Electric Corporation,	)	Arkansas
	)	
Appellant.	)	

The Court having considered motion of appellees for attorneys' fees, together with objection thereto,

It is ordered that appellees are awarded attorneys' fees in the sum of \$7,275.00.

April 25, 1983

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FILED

JUL 18 1983

ALEXANDER L. STEVAS  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1982

WESTINGHOUSE ELECTRIC CORPORATION,

*Petitioner,*

v.

CHRISTINE VAUGHN and MARION GEE,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF IN OPPOSITION**

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No.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

=====

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN and MARION GEE,

Respondents.

=====

On Writ Of Certiorari To The United  
States Court of Appeals For The Eighth Circuit

=====

BRIEF IN OPPOSITION

=====

Statement of the Case

This case is before this Court for the second time on a petition for writ of certiorari by the defendant Westinghouse from the second opinion rendered in this case by the United States Court of Appeal for the

Eighth Circuit. This case raises now familiar questions regarding the burdens of proof and of producing evidence in a lawsuit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, and whether the District Court's opinion, twice upheld by the Court of Appeals, may be considered to be clearly erroneous.

Reviewing the record and the District Court reasoning, the Court of Appeals found that the lower court's consideration of the record as a whole was sufficient along with its detailed factual findings, to support its conclusion that Vaughn was unlawfully disqualified from her job as a sealex operator. Specifically, the Court of Appeals held, "We cannot say after a review of the record, that we are left with a definite conviction that a mistake was committed in the district court's findings of fact."<sup>1/</sup>

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<sup>1/</sup> Vaughn v. Westinghouse Electric Corp., 702 F.2d 137, (8th Cir. 1983). See also United States v. United Staets Gypsum Co., 333 U.S. 364, 395 (1948).

## Summary of Argument

The petition for a writ of certiorari should be denied for four reasons: (1) The petitioner has distorted the record and misconstrued the holdings of the courts below in a manner which obscures the issues and the findings in this case; (2) The decision of the District Court was not clearly erroneous; (3) The Eighth Circuit's holding and the reasoning of the District Court are consistent with the decisions of this Court; and (4) The holdings of the Eighth Circuit are fully consistent with the decisions of the other circuits.

## ARGUMENT

### Reasons For Denying The Writ

- I. THE PETITION FOR CERTIORARI DISTORTS THE RECORD AND MIS-CONSTRUES THE HOLDINGS OF THE COURTS BELOW.

Because this case was fully tried on

the merits the defendant's attempts to frame the issues in terms of the making and refuting of a prima facie case and the establishment of pretext is singularly inappropriate.<sup>2/</sup> The predominant holding of the District Court and the Court of Appeals is simply that the trial court may consider the record as a whole in determining whether, in a lawsuit tried pursuant to Title VII,<sup>3/</sup> the proffered reason for the employer's action was pretextual, and that here, there was no basis for holding that the District Court's judgment was clearly erroneous.

The District Court offered the following view of its obligation to review and weigh the evidence before it:

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<sup>2/</sup> United States Postal Service Board of Governors v. Aikens, \_\_\_ U.S. \_\_\_, 75 L.Ed.2d 403, 409 (1983).

<sup>3/</sup> 42 U.S.C. § 2000e et seq.

The Court believes itself obliged, however, to consider the whole record, including those portions of the evidence that may throw indirect light on defendant's conduct. The Court is not called upon to express a generalized judgment about Westinghouse's employment policies. This is only an individual action challenging a single employee's disqualification and transfer to a lesser-paying job. But circumstantial evidence of intent, as well as direct, is relevant and can be persuasive. Direct evidence of discrimination is rare. An individual personnel action can usually be properly judged only if it is placed in the broader context of defendant's actions over a substantial period of time.

Vaughn v. Westinghouse Electric Corporation,  
523 F. Supp. 368, 370 (E.D. Ark. 1982) (Pet.  
App. B-4)<sup>4/</sup>

This Court's recent holding in United States Postal Service Board of Governors v. Aikens, \_\_\_ U.S. \_\_\_, 75 L.Ed.2d 403, n.3 offers unequivocal support for this view.

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<sup>4/</sup> Citations in this form refer to the appendix to the petition.



As in any lawsuit the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See International Brotherhood of Teamsters v. United States, 431 U.S. 324 n.44 ... (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination").

That plain statement, that Title VII does not require direct proof of discrimination, in itself answers the primary legal argument pressed by the defendants.<sup>5/</sup>

However, ignoring the full and accurate statement of the facts by two courts in four opinions below, see 620 F.2d 655, 656-657 (8th Cir. 1980); 702 F.2d 137, 139 (8th Cir. 1983) (Pet. App. A 2-4) 471 F. Supp. 281,

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<sup>5/</sup> Ironically, while the defendant cites Aikens at least twice in his brief, nowhere does he discuss the specific resolution Aikens offers to the complaints they raise.

283-290 (E.D. Ark. 1979); 523 F. Supp. 368, 371 (E.D. Ark. 1982) (Pet. App. B 4-6), the petitioner again seriously distorts the record and has misconstrued the holdings of those courts in its quest for new factual findings in this Court. This effort fails to recognize that this Court simply does not sit to resolve disputed issues of fact.

The defendant argues that their employment statistics were only marginally bad (i.e. "less-than-perfect") concerning black representation in the workforce (Pet. 6);<sup>6/</sup> that plaintiffs failed to offer any evidence relating to the challenged employment decision (Pet. 6); that defendant's allegations regarding the reasons for the discharge of plaintiff Vaughn were unrebutted (Pet. 8); and that plaintiffs' only evidence was statistical

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<sup>6/</sup> Citations in this form refer to the Petition.

and/or general (Pet. 10). None of these assertions withstand even a casual review of the record.

Following the initial trial, the District Court carefully considered the evidence before it and made extensive findings regarding the defendant's policy and practices with respect to minority employment. There the Court found that at the time Title VII became effective in 1965, virtually no blacks were employed by the defendant; there was only one black white-collar employee, a secretary; no blacks in supervisory positions; and only one black hired as a production employee. Vaughn v. Westinghouse Electric Corp., 471 F. Supp. at 284.

The Court goes on to find that post-Act change in this situation was slow, indicating that out of 22 office and clerical employees only 3 were black and none of them were in

supervisory positions; that no blacks had ever been employed as supervisors in the defendant's office force at the plant involved in this case; that of 25 or 26 supervisors, including manufacturing supervisors who hold entry level management jobs, only 2 were black. Id. at 284. The Court's opinion continues to make additional findings regarding the discriminatory effect of defendant's practices by noting their failure to post vacancies for supervisory positions; the discriminatory effect of its hiring practices which keeps blacks confined to lower paying jobs; and the racial stratification of its workforce, particularly noting the lack of blacks hired into maintenance jobs and the high rate of discharges among blacks. Id. at 285.<sup>7/</sup>

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<sup>7/</sup> Of 65 persons discharged between 1972 and 1978, 39 or 60% were black, "a figure far above the overall proportion of black employees, which is now at a high of about 24 or 25%." 471 F. Supp. at 285.

Similarly telling was the Court's finding that given the high number of blacks applying for jobs at Westinghouse; the disproportionately low numbers of blacks obtaining positions; and the inability of the defendant's personnel manager to explain these figures; "[T]he inference is very strong indeed that the number of black people hired is being artificially depressed." Id. at 284. Accord, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

In the context of this type of statistical data the Court succinctly expressed its view with respect to the fact that no specific qualifications had been set out by the employer for either production-line jobs or supervisory jobs.

Subjective criteria for employment are not illegal in themselves but the

fact that an employer has continued to use them, with the danger of disparate treatment that they entail, is a factor to be considered.

471 F. Supp. at 285.<sup>8/</sup>

The defendant's petition again implies that the Court[s] below required the defendant to establish "objective standards" for disqualification of employees as a prerequisite to its ability to prevail on the ultimate question. However, neither of the Courts below ever imposed such a requirement. In fact the District Court specifically rejected such a course, see 471 F. Supp. at 291, and the Court of Appeals made no mention of such a standard. Rather, both Courts found that in

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8/ Compare Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972) cert. denied 409 U.S. 862 (1972) "[t]he lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's workforce."



light of the statistical and documentary evidence, the conflicting nature of testimony offered at trial, and the defendant's disputed statements regarding plaintiffs' poor production, that the plaintiffs had met their burden on "the ultimate question of discrimination vel non." United States Postal Service Board of Governors v. Aikens, 75 L.Ed.2d at 409.

Moreover, the Court found that plaintiffs testimonial evidence was persuasive in giving life to their statistical evidence. Specifically, the Court found the testimony of Ms. Wilma Donley, a former employee and union shop steward to be particularly enlightening regarding the harassment of black employees by the largely white foremen and supervisory staff. While noting that much of Ms. Donley's wide-ranging testimony was contradicted by company witnesses, the Court specifically credited her testimony. Vaughn v. Westinghouse



Electric Corp., 471 F. Supp. at 286. Similarly, such factual questions regarding whether or not the defendant's supervisor actually advised plaintiff of her so-called deficiencies was also disputed. Vaughn, 702 F.2d at 139.

On remand, the Court added to its detailed summary of the evidence, finding that:

[A]lmost all of the defendant's supervisors, including the two men under whom plaintiff worked as a sealex operator are and have been white; that most labor-grade-four sealex operators in 1971, when plaintiff was disqualified were white (Tr. 15); that 'basically all' the labor-grade-one bulb loaders (the lower-paying job to which plaintiff was demoted) were black (Tr. 17); that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O. D. Brazil, before her transfer to Mr. Turnage's shift; and that plaintiff had progressively been given pay increases, until, several months before her disqualification, she had reached the top of pay available for that work.

Vaughn v. Westinghouse Electric Corp., 523 F. Supp. at 371 (Pet. App. B 5).

The defendant, erroneously characterizing these and other findings as "generalized evidence" now pleads for a rule inapplicable to the facts of this case, that would strictly limit the interpretation given to various types of evidence and unduly hinder the lower courts from giving full consideration to all the evidence before it.<sup>9/</sup>

Such a procedure plainly violates the clear holding of cases such as Aikens, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Teamsters, 431 U.S. 324 (1977), and ignores the prescriptions of such cases as Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), which indicated that the presumptions, articulations and shifting of burdens are primarily concerned with insuring that the issues are drawn and the evidence presented in a managable way to the trier of fact.

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<sup>9/</sup> Compare Aikens, \_\_\_\_ U.S. \_\_\_\_, 75 L.Ed.2d at 411.

II. THE HODLING OF THE COURT OF APPEALS AND THE REASONING OF THE DISTRICT COURT ARE CONSISTENT WITH THE DECISIONS OF THIS COURT AND ARE NOT CLEARLY ERRONEOUS.

The trial court gave careful consideration to the facts presented in this case. It has on three occasions addressed itself to the applicable law. The care with which the Court addressed these facts and issues is additionally made clear by the distinctions it drew between the experiences of the various original plaintiffs and the manner in which it evaluated the claims of plaintiff Vaughn.<sup>10/</sup> This careful consideration of the record is fully consistent with the Supreme Court's holdings in Aikens, 75 L.Ed.2d at 411; Burdine,

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<sup>10/</sup> The District Court found against plaintiff Vaughn on four other claims of racial discrimination, 471 F. Supp. 281, 289, and similarly denied the claims of original plaintiffs Crutcher and Gee, 471 F. Supp. 286-288.

450 U.S. at 254; and McDonnell Douglas, 411 U.S. at 804. As this Court held in Aikens, 75 L.Ed.2d at 410:

The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, supra, at 577, 57 L.Ed.2d 957, 98 S.Ct. 2943.

In the case at bar the District Court and the Court of Appeals sensitively applied the principles articulated in the holdings of this Court and determined on the basis of "all the evidence" that "the defendant intentionally discriminated against the plaintiff. Aikens, 75 L.Ed.2d at 409, 410. See also Burdine, 450 U.S. at 253.

The initial Court of Appeals decision in this case, 620 F.2d at 660, cited the opinion of the Third Circuit in Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3rd Cir. 1979) for two propositions still relevant to this cause.

[T]here are no hard and fast rules as to what evidence must be considered as constituting a prima facie case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the factfinder that there has been illegal discrimination resides always with the plaintiff. We will thus review the judgment of the district court not with an eye to strict adherence to form but in order to determine whether the decision on the merits of plaintiff's case is clearly erroneous on the facts, or uncongenial to previously enunciated legal standards.

In the case at bar, the trial court carefully considered the record as a whole and determined that the plaintiff had established her case by a preponderance of the evidence. The trial court's factual findings reviewed and upheld by the Court of Appeals twice, make plain that notwithstanding the defendant's articulation of facially valid reasons for its disputed conduct, weighed against the record as a whole, there was sufficient basis for the Court's holding that the plaintiff was disqualified in violation of Title VII, and

that a review of the record did not leave a definite conviction that a mistake was committed in the District Court's findings of fact. Vaughn, 702 F.2d at 137 (Pet. A 4) citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See also, Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982).

III. THE HOLDINGS OF THE EIGHTH CIRCUIT  
ARE CONSISTENT WITH THE DECISIONS  
OF OTHER CIRCUITS

The Courts of Appeals have generally understood that McDonnell Douglas provides an analytical framework for evaluating claims of employment discrimination and they have been sensible and flexible in their application of its standards.<sup>11/</sup> Similarly, the lower courts have correctly concluded that

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<sup>11/</sup> Notwithstanding the broad range of the types of discrimination charged and the methods of proof available, the Courts of Appeals have had no difficulty ordering



McDonnell Douglas standards were not altered by Burdine, supra, see, e.g., Harrell v. Northern Electric Co., 672 F.2d 444, 448 (5th Cir. 1982). Now, with this Court's recent opinion in Aikens, there is little or no need for further exposition on the balancing of burdens or other legal rituals. Rather, once the parties have made their presentations, and the defendant has done all that would be required of him assuming that the plaintiff has made out a prima facie case:

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11/ continued

their evaluation of the cases pursuant to the demands of McDonnell Douglas. King v. New Hampshire Dep't of Resources, 562 F.2d 80, 83 (1st Cir. 1977); Loeb v. Textron Inc., 600 F.2d 1003, 1013-1019 (1st Cir. 1979); Wright v. National Archives Records Service, 609 F.2d 702 (4th Cir. 1979); Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977); Peters v. Jefferson Chemical Co., 516 F.2d 447, 449-450 (5th Cir. 1975); Davis v. Weidner, 596 F.2d 726, 729-30 (7th Cir. 1979); Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980).



The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiffs. Burdine, supra at 253, 67 L.Ed.2d 207, 101 S.Ct. 1089.

Aikens, \_\_\_\_ U.S. \_\_\_\_, 75 L.Ed.2d at 410.

Nothing more clearly illustrates this general lack of confusion than the cases cited by petitioner<sup>12/</sup> in its efforts to convince this Court that confusion reigns below. These cases each share with Aikens and the Eighth Circuit's decision in Vaughn, an evaluation of the record as a whole and review analysis guided by the clearly erroneous rule.

In commenting upon Grano v. Department of Development, 699 F.2d 836 (6th Cir. 1983) the petitioner asserts that it was only the lack of objective standards which swayed the Court in Vaughn. This is plainly not the case -- though as similarly pointed out in Grano the subjectivity of the evaluation process was a factor to be considered.

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<sup>12/</sup> Pet. 11-12.

Grano was plainly a case in which the District Court relied on a review of the "record as a whole" and on this basis ruled for the defendant notwithstanding the subjective nature of the evaluation process.

In the instant case the district court engaged in the probing analysis of Huddle's evaluation process and concluded that the ultimate decision was not based on plaintiff's sex.

Grano, 699 F.2d at 838.

Similarly, the defendant grossly misstates the holding of Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983). There, the Tenth Circuit specifically cited McDonnell Douglas, 411 U.S. at 804 for the proposition that, "the employers 'general policy and practice with respect to minority employment' particularly statistics reflecting a general pattern and practice of discrimination," constitutes relevant evidence for a showing of pretext. Thus while the Court in Mohammed v. Callaway, certainly considered evidence of direct com-

parisons between the rejected plaintiff and the non-minority successful applicant, it is also clear that indirect or circumstantial evidence was also important to its ultimate conclusion. Mohammed, 698 F.2d at 401.

Significantly, the Court in Mohammed applied the clearly erroneous rule as interpreted in United States Gypsum Co., 333 U.S. at 395 and held:

In sum, the record as a whole does not support the district court's finding that both candidates were amply qualified.

Mohammed, 698 F.2d at 401.

In Montgomery v. Yellow Freight Systems, 671 F.2d 412, 413 (10th Cir. 1982), the Court of Appeals held that "Taken as a whole, we believe the evidence in this case supports the trial judge's findings." In Montgomery, unlike Vaughn, the plaintiff apparently offered little or no evidence that would establish any pattern of behavior by the defendant and similarly failed to offer

any credible comparative or direct evidence. Thus there is no basis to compare the showings made in Montgomery and the showings made in Vaughn; as in Vaughn, both direct and circumstantial evidence were offered.<sup>13/</sup> Thus the primary similarity in the cases is the Court's view that the case must be evaluated on the record as a whole, evaluating all the relevant evidence.

Finally, in Perryman v. Johnson Products Co., Inc., 698 F.2d 11381 (11th Cir. 1983) the Court explicitly observes that the three-step test of McDonnell Douglas is appropriate in such cases and that direct as well as circumstantial evidence is relevant to the inquiry. .

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<sup>13/</sup> It was, however, impossible to offer specific direct evidence regarding the effect of a specific number of burnt wires, since the defendant never established uniform production standards.

IV. THE DISTRICT COURT PROPERLY CONSIDERED THE ORDER OF PROOF PRESENTED AS WELL AS THE WEIGHT TO BE ATTRIBUTED TO THAT PROOF

The defendant argues for a rule that would strictly determine the order as well as the type of proof that the Court may review in determining who prevails on the ultimate question in an individual Title VII case. Moreover, here, the defendant essentially challenges the weight the District Court assigned to various elements of proof presented and attempts to have those findings held clearly erroneous on that basis.

The thrust of the defendant's argument requires a reading of Burdine that is inconsistent with the plain meaning of the text. That is, nowhere does the Burdine Court hold that once the defendant articulates a "facially valid reasons[s]", Sweeny v. Board of

Trustees of Keena State College, 604 F.2d 106, 108 (1st Cir. 1979), no more is needed in order for the defendant to prevail. Such a position carelessly elevates the Court's "articulation" standard beyond its function of ordering the presentation of proof to insure that the issues are drawn and the evidence is presented in a manageable way to the trier of fact. Burdine, 67 L.Ed.2d at 216.

The defendant's formulation requires that once the defendant has made its articulation the Court may only consider evidence which directly challenges that articulation. While as indicated supra, much of plaintiff's evidence and the trial court's findings directly challenges the defendant's claims of incompetence on the part of plaintiff Vaughn, the language of Burdine nowhere suggests that all other evidence is irrelevant. Rather, since the defendant's showing is sufficient if its articulation raises a genuine issue



of fact as to whether the employer discriminated against the plaintiff, it follows that the presumptions, articulations and shifting of burdens are primarily concerned with sharpening the inquiry, that is, determining whether a question of fact exists, rather than limiting the scope of evidence the court may review or otherwise restricting its review of the record as a whole. Indeed, if in determining whether or not there has been intentional discrimination, the court may not look at the record as a whole, what meaning is then left to the Court's holding in McDonnell Douglas Corp., 411 U.S. at 802-804, that plaintiff must have the opportunity to prove her case "by a preponderance of the evidence."

Paradoxically, the defendant argues for this limitation on the Court's ability to review the whole record, in exactly the type



of situation in which the whole record is most helpful, a case involving intentional discrimination in which there is a lack of objective standards by which to judge the plaintiff's performance. The defendant argues in effect that the trial court rules against it because of the absence of objective criteria. This was not the Court's holding. Rather it was the opposing evidence concerning plaintiff's production, coupled with the absence of objection production criteria, and the plaintiff's other evidence regarding the defendant's "general policy and practice with respect to minority employment,"<sup>14/</sup> all taken together, which led to the Court's holding in this case.

Repeatedly, the defendant mistates the effect of its lack of objective criteria,

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<sup>14/</sup> McDonnell Douglas Corp. v. Green, 411 U.S. at 804.

and its failure to communicate a standard of production to plaintiff. Such practices, which necessarily introduce subjectivity into the decision making process, must be carefully scrutinized, particularly where, as here, the supervising staff is largely white, blacks are disproportionately concentrated in lower level jobs, and blacks are disproportionately discharged. Moreover, as this Court and others have held in several contexts, subjectivity at the point of selection can easily mask discrimination, and calls for particular scrutiny by the courts.<sup>15/</sup>

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<sup>15/</sup> Turner v. Pouche, 396 U.S. 346, 360 (1970); see also Davis v. Califano, 613 F.2d 957, 965-66 (D.C. Cir. 1980); Mistretta v. Sandra Corp., 649 F.2d 1383 (10th Cir. 1981); Nanty v. Borrows Co., 660 F.2d 1327, 1332 n.5 (9th Cir. 1981); and Robbins v. White-Wilson Medical Center, Inc., 642 F.2d 153, 156 (5th Cir. 1981).

In the case at bar, the trial court carefully considered the record as a whole and determined that the plaintiff had established her case by a preponderance of the evidence. The trial court's factual findings reviewed and upheld by the Court of Appeals on two occasions, make plain that notwithstanding the defendant's articulation of facially valid reasons for its disputed conduct, weighed against the record as a whole, there was sufficient basis for the Court's holding that the plaintiff was disqualified in violation of Title VII.

#### Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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DEC 1 1983

ALEXANDER L. STEVAS.  
CLERK

No. 82-2042

In The  
**Supreme Court of the United States**  
October Term, 1983

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WESTINGHOUSE ELECTRIC CORPORATION,  
*Petitioner,*

vs.

CHRISTINE VAUGHN,  
*Respondent.*

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On Writ of Certiorari to the United States Court  
of Appeals for the Eighth Circuit

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**BRIEF FOR THE PETITIONER**

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## QUESTIONS PRESENTED

- (1) When a generalized *prima facie* case has been rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, is the plaintiff required to present evidence concerning the particular conduct in issue in order to establish pretext?
- (2) Whether the district court's application of generalized evidence from the *prima facie* case to meet plaintiff's pretext burden effectively foreclosed defendant's opportunity to rebut the inference drawn from the *prima facie* case, and was therefore clearly erroneous or inconsistent with previously enunciated legal standards?
- (3) When discriminatory animus has been shown to have been a factor in the decision, may the defendant overcome a finding of discrimination by establishing that the challenged employment decision would have occurred in any event, even absent the discrimination?

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## Argument:

- I. When in an individual disparate treatment case a generalized *prima facie* showing, consisting of general workforce statistics and anecdotal evidence, is rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, the plaintiff is required to present responsive and narrowly focused evidence concerning the particular conduct in issue in order to establish pretext. .... 11
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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A to the Petition for Certiorari and is reported at 702 F.2d 137 (8th Cir. 1983). The opinion of the United States District Court for the Eastern District of Arkansas, Richard Sheppard Arnold, Circuit Judge, sitting by designation, appears in Appendix B to the Petition for Certiorari, and is reported at 523 F.Supp. 368 (E.D. Ark. 1981).

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## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit (Pet. App. C, pp. C-1 - C-2) was entered on March 11, 1983. The petition for a writ of certiorari was filed on June 8, 1983 and was granted on October 17, 1983. The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

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## STATUTORY PROVISIONS INVOLVED

*United States Code*, Title 42:

§ 2000e-2. *Unlawful employment practices—Employer practices*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**STATEMENT OF THE CASE**

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(f) and § 2000e *et seq.*, and under 28 U. S. C. § 1343(4). (JA 5). The dispute arose when the respondent, Ms. Christine Vaughn, a black female employee, filed suit along with two other plaintiffs alleging among other things that she was disqualified in 1971 as a sealex machine operator because of her race by the petitioner Westinghouse Electric Corporation. At the conclusion of a trial to the court, the district court found against the two other plaintiffs on their claims (JA 333, 335) and found against Vaughn on all of her claims except the single claim regarding her disqualification as a sealex machine operator. (JA 336, 338). The claims of the other plaintiffs were not the subject of an appeal, and are not before this Court.

Ms. Vaughn was hired by Westinghouse on July 13, 1970, as a sealex machine operator on the second shift, labor grade four, at the wage rate of \$2.20 per hour. (JA 292, DX 35v). She received rate increases in accordance with the collective bargaining agreement (JA 266-68, DX 2) (DX 35q-u) until she reached the top pay rate for her classification on November 16, 1970. (JA 287, DX 35q). On that same day, she was transferred to Mr. Oscar D. Brazil's section, and was again transferred on January 25, 1970 to the third shift due to a reduction in force. (JA 286, DX 35p). She continued in that position on the third shift under the supervision of Mr. Clint T. Turnage until April 19, 1971, when she was disqualified as a sealex machine operator by Mr. Turnage and placed on an open labor grade one position, bulb loader-hand, resulting in a loss of pay of \$.24 per hour. (JA 285, DX 35o). She remained from that time in the employ of Westinghouse and



at the time of trial held the rate of labor grade three at \$5.40 per hour. (JA 271, DX 35a).

At the time Ms. Vaughn was transferred from sealex machine operator on the second shift, her section supervisor, Mr. Brazil, evaluated her quantity and quality of production as poor and recommended that she not be rehired in that position. (JA 293-94, DX 36) (dated January 20, 1971). Two days before that evaluation, Mr. Brazil had signed a personnel form which reflected that Ms. Vaughn was to be placed as a sealex machine operator on the third shift, and which contained an entry that Ms. Vaughn had had "previous satisfactory experience" in that position on the second shift. (JA 295, DX 36). Mr. Brazil also testified that he had warned Ms. Vaughn about her poor performance and attendance problems (JA 245). Ms. Vaughn did not dispute this testimony, although her main complaint related to Mr. Brazil. (JA 52).

On the third shift, under Mr. Turnage's supervision, Ms. Vaughn was verbally warned on five separate occasions, four times in the presence of a union shop steward, that her production was unacceptable because of an inadequate number of lamps sealed and too many burnt wires. These verbal warnings were noted in writing by Mr. Turnage, and his notes were made a part of the trial record. (JA 296-311, DX 37-40). On April 19, 1971, Ms. Vaughn was disqualified from her job as sealex machine operator. (JA 285, DX 350). The disqualification form noted that she could not hold this job in the future and stated that although she got along well with others and had good attendance, her work quality and quantity were poor, the supervisor was unable to motivate her, and she showed no interest in the job as a sealex machine operator. (JA 312-13, DX 41).



Ms. Vaughn did not dispute that she had some problems on the third shift, but she did testify that Turnage had never warned her of her poor production. (JA 44). She stated that he had given her assistance (JA 44); that he told her she had been disqualified by a notice from the front office (JA 51); and that she did not think Turnage acted because of her race, although "it's possible" that he or someone else had (JA 51-52). Ms. Vaughn did not file a grievance with the union over the disqualification (JA 42). Ms. Vaughn apparently never again bid on or sought a sealex machine operator position, even though she was unaware that she was precluded from doing so, and at trial considered herself a "qualified sealex operator." (JA 28). In a skills survey conducted in 1976 by the company for all female employees, Ms. Vaughn listed only "utility operator," and not sealex machine operator, as a higher-paying job she was qualified for. (JA 317, DX 49c).

The district court originally held that the plaintiffs had established a prima facie case of racial discrimination under the rationale of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Vaughn v. Westinghouse Electric Corp.*, 471 F. Supp. 281, 286 (E.D. Ark. 1979). (JA 324). That finding was based primarily upon a finding of low black representation in non-production jobs, including supervisory and management positions, an apparent but unexplained adverse impact upon black applicants in the Defendant's hiring and discharge decisions, (JA 326-8), testimony by Ms. Wilma Donley that black employees were mistreated in the plant, (JA 328-9), and the proof that Ms. Vaughn had held the position, was disqualified, and a white employee replaced her. (JA 336-37). The district court then held, with respect only to Ms. Vaughn's

disqualification, that Westinghouse had failed to demonstrate proof sufficient to overcome plaintiffs' prima facie case. (JA 337, as modified by Order of May 23, 1979, JA 339-40).

From that judgment, Westinghouse appealed, alleging that the district court had misapplied the burdens of proof. The Court of Appeals for the Eighth Circuit affirmed in a two-to-one majority decision. 620 F.2d 655 (8th Cir. 1970) (JA 346).

On March 9, 1981, the Court granted Defendant's petition for certiorari, summarily vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). (JA 360-61). The Court of Appeals remanded with the same directions to the trial court. (JA 361-62). On remand, the trial court<sup>1</sup> held that, even though it was in error in placing too great a burden on the Defendant, after reviewing the record as a whole, its original finding of discrimination against Vaughn should be reaffirmed. (Pet. App. B). The Court awarded \$1,696.25 plus interest to the plaintiff, representing back pay to and including May 30, 1979, (JA 375), \$1,087.25 in costs, and \$15,730.00 in attorney's fees. (JA 376). This was later amended to add \$29.46 in back pay. (JA 378). Westinghouse again appealed, challenging the trial court's finding that the reasons articulated for the disqualification were pretextual. In another two-to-one majority decision the Court of Appeals affirmed, holding that the district court's finding of pretext was not clearly erroneous. (Pet. App. A). The Court of Appeals awarded

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<sup>1</sup>The trial judge, Honorable Richard S. Arnold, had in the interim between the original trial and the remand been elevated to the Court of Appeals for the Eighth Circuit. He heard the case on remand as Circuit Judge sitting by designation.

costs to Vaughn in the amount of \$57.00, and additional attorney's fees in the amount of \$7,275.00.

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### SUMMARY OF ARGUMENT

In the seminal decision on disparate treatment cases under Title VII, *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), the Supreme Court created the groundrules for the order and allocation of proof. The Court established a minimum threshold for the prima facie case, and set the requirements necessary to overcome it. Then, said the Court, the plaintiff was to be given an opportunity to establish that the legitimate reasons given by the defendant as the basis for the employment decision were a pretext for discrimination. The Court outlined generally the nature of evidence that could be used to show pretext, *id.* at 804-05, but cautioned that general determinations should not be controlling in the face of an otherwise justifiable reason for the conduct. *Id.*, n. 19.

In *Furnco Construction Corp. v. Waters*, 438 U. S. 567 (1978), the Court described the plaintiff's treatment burden as a requirement to show that he was treated less favorably than others because of his race. The Court again held that, while generalized statistics may have some relevance to motivation, they were not conclusive. *Id.* at 578. The Court clarified in *Board of Trustees of Keene State College v. Sweeney*, 439 U. S. 24 (1978) that because the plaintiff retained the burden of persuasion, a defendant was not required to prove the absence of discriminatory motive.

Even though the law appeared to be clear, district and circuit courts still had problems with the second stage burden of the defendant employer. The courts expressed

an unwillingness to allow the presumption arising from the prima facie case to be rebutted by simple articulation of a facially valid reason, and sought to impose a greater burden. The court then decided *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), clearly setting forth the burden to be imposed at the second stage, and further describing the analysis to be utilized in the third or pretext stage. The Court required that, after the defendant had articulated a legitimate non-discriminatory reason for the conduct, the presumption dropped from the case, and the burden of going forward shifted back to the plaintiff, where the burden of persuasion had remained. The Court indicated that the inquiry proceeded to a new level of specificity to determine either that the employer's reasons were not worthy of credence, or that more likely than not the employer was actually motivated by unlawful considerations.

Most recently, in *United States Postal Service Board of Governors v. Aikens*, — U.S. —, 103 S. Ct. 1478 (1983), the Court disapproved a wooden or mechanistic approach to the order and allocation of proof in treatment cases, and held that the plaintiff's pretext burden merged with the ultimate burden of persuading the Court that he had been the victim of intentional discrimination. The trial court was directed to consider the whole record, rather than singling out portions, to decide this issue. But the Supreme Court relied heavily upon the language of *Burdine* in deciding *Aikens*, and clearly did not intend *Aikens* to modify the burdens which earlier decisions had established. The case merely allows the trial court to draw proper inferences from the entire record in order to decide the ultimate issue.

The circuit courts have applied the foregoing cases in a variety of ways. This wide discrepancy led the Su-

preme Court to vacate and remand several cases, including the instant case, in light of *Burdine*. The Eighth Circuit has been unable to agree even with itself in the use of generalized evidence to show pretext. In fact, in three cases argued on the same day to the same panel, that Court reversed one court because it did not agree that generalized evidence was enough to contradict the specific articulation by the employer, *Danzl v. North St. Paul Maplewood-Oakdale Independent School District No. 622*, 706 F. 2d 813 (8th Cir. 1983); it affirmed another court because the plaintiff, through generalized evidence, had not borne her burden of establishing that the employer's reason was racially motivated, *Robinson v. Arkansas State Highway and Transportation Commission*, 698 F. 2d 957 (8th Cir. 1983); and it affirmed the trial court in *Vaughn*, finding pretext based almost solely on generalized evidence concerning the employer's workforce. These cases cannot be factually distinguished, nor can they be resolved legally.

The district court committed clear error in this case when it applied the generalized evidence concerning the employer's workforce conclusively to overcome the petitioner's specific rebuttal evidence. In so doing, the court gave the respondent the benefit of a presumption which should have dropped from the case, and imposed upon the petitioner the requirement to prove an absence of discriminatory motive, even though the respondent had never established the existence of the motive in the first place.

The court relied upon vague and generalized testimony which was unrelated to Ms. Vaughn's disqualification, and which come from an employee who was not working there at the time; generalized hiring, discharge, and placement evidence, without expert analysis; the conflicting reports by Vaughn's previous supervisor that she



was "satisfactory" but a "poor performer"; and the fact that the disqualifying supervisor had never communicated objective standards for production and had never stated that race was not a factor in his decision. Balanced against that evidence was the uncontradicted proof that respondent had had problems with production on the second shift; that these problems continued on the third shift; that she disliked the third shift and her job; that her supervisor had warned her five times, often in the presence of shop stewards, of her poor production, and that he took time to count specifically her number of errors in comparison to other workers; that in spite of this she did not improve; and that, of the three persons her supervisor had previously disqualified, only one, Vaughn, was black. By finding the plaintiff's evidence to preponderate, the trial court accorded conclusive weight to evidence which was unrelated to the employment decision at issue. This ignores the requirement of *Burdine* that the court's focus should reach a new level of specificity at the pretext stage, even though the issue was before the court on remand with express instructions to follow *Burdine*. Petitioner asserts that, in order to show pretext, the respondent's proof must be responsive to the petitioner's asserted reason for its conduct. Assigning a causal connection and probative force to unrelated statistical and anecdotal evidence on this issue effectively foreclosed the petitioner's opportunity to rebut the *prima facie* case, and ignored established case law.

If the court decides, correctly or incorrectly, that a plaintiff has established that racial motive may have played a part in the decision, the court is required to test that proposition, in the light of all of the evidence, to determine whether, for example, he acted any differently toward the plaintiff than he would have acted toward a sim-

ilarly situated person of the majority race. This or a similar test is implicit in the decisions of the court in *Burdine* and *Aikens*. It does not, however, require additional ordering of the proof, or the glossing of another presumption and rebuttal onto the *McDonnell-Burdine* formulation. It requires only the sort of analysis typically applied by trial courts to resolve issues of fact. The trial court here did not purport to do otherwise, but the effect of its analysis was to require the petitioner to rebut an unwarranted presumption by a preponderance of the evidence, and so is no different in result than *Perryman v. Johnson Products Company, Inc.*, 698 F. 2d 1138 (11th Cir. 1983). In any event, the petitioner here met even that excessive burden, and the court's decision to the contrary was inconsistent with previously enunciated legal standards and was clearly erroneous. This is demonstrated by the fact that the trial court found the same prima facie evidence unconvincing as to the other plaintiffs in *Vaughn*, even though the evidence was less remote as to their claims.

While *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) emphasizes the degree of deference a trial court's findings are afforded in such cases, the litigation history of *Vaughn*, combined with the conclusive force given to the generalized evidence, establishes that a "mistake has been committed", and this Court is authorized to correct that mistake even if it is unconvinced that the decisions in *Vaughn* suffer from any legal faults. Courts are generally less competent than employers at restructuring business practices, and this Court should not allow the kind of judicial interventiorism displayed in this case. The practical effect is ominous, both because it has substantial potential effects upon the day-to-day business practices of this country, and because it tends to encour-



age expensive, overly broad litigation to resolve individual disputes.

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### ARGUMENT

I. When in an individual disparate treatment case a generalized prima facie showing, consisting of general workforce statistics and anecdotal evidence, is rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, the plaintiff is required to present responsive and narrowly focused evidence concerning the particular conduct in issue in order to establish pretext.

A. The decisions of this Court establish guidelines for a gradual narrowing of the focus of proof to decide the ultimate issue of discrimination in individual cases.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, declares it unlawful for an employer to discriminate against any individual "because of such individual's race . . ." *Id.* Cases brought under the statute may allege that a facially neutral employment standard has a disparate impact upon minority employees or applicants, or they may allege that the plaintiff for a group of plaintiffs or class members were treated "less favorably than others because of their race . . ." *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978). *See, e.g. International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 335 N. 15 (1977). The latter theory is universally called a "disparate treatment" case. The development of the law under that theory has been relatively straightforward. In *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), this Court set forth the order and allocation of proof to be followed in treatment cases. Recognizing that an employer logically does not act without some motivation, and that it was logical to presume a discriminatory reason if no legitimate reason was offered, the Court established a relatively light

threshold burden by which a plaintiff could establish a *prima facie* case.<sup>2</sup> The plaintiff has only to show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and, (iv) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). Once the plaintiff has established a *prima facie* case based upon this low threshold of proof, a judicially-imposed presumption arises "that the employer unlawfully discriminated against him." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The presumption is in the form of a legally-mandatory inference. *Id.* n. 10. Not unlike any other presumption arising under Rule 301, Federal Rules of Evidence, it is rebuttable. To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reason for the plaintiff's rejection." *Burdine*, *supra*, at 255. Put another way, the defendant must "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Id.* at 254. Once the defendant has given a facially satisfactory reason, the presumption disappears, and the burden of going forward shifts back to the plaintiff, where the ultimate burden of persuasion always remains. *Burdine*, *supra*, at 256.

The inquiry does not end merely because the defendant can produce a facially legitimate reason for its conduct. Under the *McDonnell-Burdine* formula, the plain-

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<sup>2</sup>The Court implicitly recognized, too, that the employer had greater access to witnesses, evidence, and litigation resources than did the typical Title VII plaintiff.

tiff must then be given an adequate "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *United States Postal Service Board of Governors v. Aikens*, — U. S. —, 103 S. Ct. 1478, 1481 n. 5 (1983), quoting *Burdine*, *supra*, at 256. This burden "merges with the ultimate burden of persuading the Court that [the plaintiff] has been the victim of intentional discrimination." *Burdine*, *supra*, 450 U. S. at 256.<sup>3</sup> "In short, the district court must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, — U. S. —, 103 S. Ct. 1478, 1482 (1983). On the nature and quantum of proof required at the pretext stage, *Burdine* holds that after a satisfactory explanation by the employer, the presumption "drops from the case," 450 U. S. at 255 n. 10, and "the factual inquiry proceeds to a new level of specificity." 450 U. S. at 255. (Emphasis added).

*Aikens* holds that a trial court must not use the *McDonnell-Burdine* formula as a stilted mechanism by which to structure the presentations of the parties. Further, because of the very nature of "state of mind" or "intent" evidence, the plaintiff may offer either direct or circumstantial proof, or both, in order to show pretext. *Aikens*, *supra* at —, 103 S. Ct. 1482-83. It is recognized that the employer's pattern or practice of discrimination is admissible to show pretext, and the trial court should consider the entire record to decide the ultimate question "whether the defendant intentionally discriminated against the plaintiff." *Id.*, citing *Burdine*, *supra*, at 253. The proof, however, must be relevant to the

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<sup>3</sup>"The plaintiff retains the burden of persuasion. She may succeed in this either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S. at 256.

now-defined issue. The plaintiff, if he is to use circumstantial or generalized pattern-and-practice evidence, should be required to establish a causal connection between that evidence and the challenged conduct. It is the position of the petitioner that, for reasons of both practical and legal significance, such a showing of causation is required before a defendant may be held liable for intentional discrimination. As the *Aikens* Court held, "... none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Aikens, supra*, 103 S. Ct. 1482. Yet in the instant case, the trial court and the reviewing court did just that. It is clear from the record that these courts imposed an unfair and excessive burden upon the defendant from the outset, and that despite frequent changes in the semantics of the lower courts' opinions, that burden, in the form of an irrebuttable presumption, never properly disappeared from the case.

In the first opinion of the trial court in *Vaughn*, the petitioner was found to have failed to meet its burden of *persuasion*. The following language makes that clear:

The Court is not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons. . . . Westinghouse, if it is to prevail, [must] show that the proof on its side is preponderant.

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Defendant's position is by no means without support, but it has simply failed to persuade this Court that its proof is sufficient to overcome plaintiff's *prima facie* case with respect to Ms. Vaughn's disqualification.

(JA 337-38, citations omitted).

The language imposing upon petitioner the burden of proving by a preponderance that race was not a factor

led petitioner to move for amended findings of fact and conclusions of law in reliance upon *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978). The trial court responded by entering an order which essentially "tailored" the earlier erroneous language to the requirements of *Sweeney*. The Court stated that "[t]his Court's opinion of May 9, 1979, did not place upon defendant the burden of showing that its reason for disqualifying the plaintiff Vaughn was not pretextual. . . . Defendant simply failed to articulate a legitimate, non-discriminatory reason for Ms. Vaughn's disqualification." (JA 340). That hold was patently incorrect. Petitioner believed then and still believes that the trial court's erroneous view of the law when the original decision was made has colored the Court's judgment throughout and that defendant has never really been relieved of the originally imposed, improper burden of persuasion.

On the first appeal, the Court of Appeals, in a two-to-one majority opinion, affirmed, holding that the trial court was not clearly erroneous in finding that Westinghouse had failed to articulate a legitimate nondiscriminatory reason for Vaughn's disqualification. (JA 354-55). Upon Westinghouse's Petition for Certiorari, this Court vacated the cause and remanded for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). (JA 360-61). The Court of Appeals remanded to the District Court with the same instructions. (JA 362).

On remand, no new evidence was taken. The trial court determined that the plaintiff had been given ample opportunity to demonstrate pretext and asked the parties to review the evidence and brief the issues in light of *Burdine*. In its opinion on remand, the Court acknowledged that an erroneous burden had been imposed upon the de-



fendant in its earlier opinions. The trial court then concluded that Westinghouse *had* articulated a legitimate nondiscriminatory reason and turned its attention to the pretext issue. (Pet. App. B-3). The Court felt obliged to consider the whole record, judged "in the context of defendant's actions over a substantial period of time," (Pet. App. B-4), and in doing so found that Vaughn was disqualified *in part* because of her race, which was a violation of Title VII. (Pet. App. B-6). In an opinion filed March 11, 1983 the Court of Appeals again affirmed, Judge Fagg dissenting, holding that, although "it may well be that the panel, if sitting as the trial judge, might have found that Westinghouse's proffered reason for plaintiff's disqualification was not pretextual, the trial court was not clearly erroneous in holding otherwise." (Pet. App. A-4). In the opinion of both courts, the same generalized evidence which, interestingly enough, had been unconvincing with respect to all of the other discrimination claims in the case, was held to be sufficient to overcome the employer's direct and unchallenged proof of the legitimate basis for the employment decision to disqualify the respondent from her sealex machine operator's job for poor productivity.

By treating generalized, unrelated evidence as conclusive, the trial court in effect negated the requirement of this Court that intentional discrimination must be proven in a disparate treatment case. The court allowed respondent to prevail based upon vague and generalized references to black representation in the workforce which should not have been sufficient under *McDonnell Douglas* or *Teamsters, supra*, even to establish a *prima facie* case. Allowing such generalized evidence to prevail over the unassailable proof that the plaintiff performed poorly in comparison to her peers is clearly contrary to the established law, and undermines the burden of proof requirements in dis-

parate treatment cases. As was held in *Clark v. Huntsville City Board of Education*, 717 F.2d 525, 529 (11th Cir 1983), "a court may not circumvent the intent requirement of the plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext." That the court did so in this case is patently obvious.

**B. Generalized evidence may not override a specific factual rebuttal of the prima facie case unless a causal connection is established by the plaintiff between the general discrimination and the particular conduct in issue.**

In straightforward terms, the ultimate result reached by the Court of Appeals and the trial court in the instant case is this: Whenever an employer has less-than-perfect statistics concerning black representation in its workforce, the discipline of a black employee, however well-deserved, is accompanied by a presumption that the discipline must have been racially motivated. It matters not that the employee offers no evidence of discriminatory motive or any evidence at all, circumstantial or direct, relating to the challenged employment decision. Apparently, it does not matter that the employee would have suffered the same result even if she had been white!

In the circumstances described above, the court has not found that respondent has established a causal link between the unexplained hiring and promotion statistics and the totally different disqualification decision which is at issue. Rather, the court has simply ruled, in effect, that petitioner has failed to show that there was no causal link. That is not and never has been the law—not under Title VII, and not under any related legal theory pertaining to burden of proof. Such a rule imposes an improper presumption upon the defendant, as well as the burden to prove a negative, or the absence of a fact. Because



Title VII creates no such statutory presumption, to impose this burden judicially is clearly error, and has resulted in the instant miscarriage of justice.

The *Burdine* decision sets forth two ways to establish pretext. In the instant case, the trial court did not find that the employer's proffered explanation was "unworthy of credence." *Burdine, supra* at 256. In fact, the court did "not doubt that the burnt wires documented by defendant in fact existed, or that production problems were a genuine concern." (523 F. Supp. at 371; Pet. App. B-5).

Further, the court noted that after reading and re-reading the disqualifying supervisor's testimony, "[t]here is no reason to disbelieve any of it." (Pet. App. B-6, n. 5). The court instead held, couching the holding in language similar to *Burdine's* other theory of pretext, that "on balance, the Court is persuaded that plaintiff's race was more likely than not one of the factors that contributed substantially to defendant's decision." (Pet. App. B-6, emphasis added). In short, even though "there was virtually no direct evidence of unlawful motivation on the part of Mr. Turnage," (Pet. App. B-4) and even though the defendant's documented reasons for its conduct were obvious and unrebutted, the court was somehow persuaded that unlawful reasons more likely motivated the employer. But, persuaded by what? Such a result applies the *Burdine* decision more as an afterthought than as a guideline for allocating the burdens in a Title VII case. It fails absolutely to recognize that a plaintiff must establish by a preponderance that the defendant intentionally discriminated against her. In light of the entire development of disparate treatment analysis, this casual easing of plaintiff's burden of persuasion effectively insures that the defendant rather than the plaintiff shoulders the ultimate

burden of persuasion once the *prima facie* presumption arises. This creates a lingering presumption that is antithetical to every decision of this Court on the subject since 1973.

In the seminal decision on disparate treatment, *McDonnell Douglas Corporation v. Green*, 411 U. S. 792 (1973), this Court discussed what evidence would be relevant at the third stage of proof, that coming after defendant has articulated a non-discriminatory reason for its actions:

On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. . . . Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

*Id.* at 804-05. It is significant that, of the factors listed, evidence concerning similarly situated white employees was considered "especially relevant," while, of the factors which "may be relevant," only the last one listed, dealing with generalized statistical evidence, was listed with a caveat. That caveat, found in footnote 19, reads in pertinent part as follows:

The District Court may, for example, determine after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive

or exclusionary practices." . . . We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

Yet the courts below have found in the instant case that that generalized evidence similar to that which this Court countenanced against to be the artificial basis for finding pretext in Vaughn's disqualification.

In *Furnco Construction Corporation v. Waters*, 438 U. S. 567, 578 (1978), this Court held that, while not conclusive, generalized statistics of the employer's employment practices could be considered in determining his motivation in particular cases. There, of course, it was the employer's balanced statistics which were urged as conclusive by the petitioner.<sup>4</sup> But the reasoning applies equally to both parties—statistics good or bad, should not establish a conclusive presumption in favor of either party in a disparate treatment case. Like any other evidence, generalized statistical evidence may be rebutted.

Against this backdrop, the Supreme Court was presented with the *Burdine* case. *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). The clear holding of *Burdine* and prior cases is that the burden of persuasion never shifts; that, because of that, the defendant never has the burden of proving an absence of discrimination; that once a non-discriminatory reason is articulated, the presumption disappears, and the trial court

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<sup>4</sup>In fact, this Court has recently ruled that favorable "bottom-line" statistics, while they "might in some cases assist an employer in rebutting the inference that a particular action has been intentionally discriminatory", may not serve as a defense in a disparate impact case, once the impact upon individuals within a protected group has been established. *Connecticut v. Teal*, 457 U. S. 440 (1982).

must focus more closely on that evidence, in the *prima facie* case or elsewhere, related to the challenged decision—the more directly-related the better—to determine if the reason proffered is credible; and that, while the generalized statistics of the *prima facie* case are relevant to pretext, they should not be determinative in the face of more specific evidence on the ultimate fact question in issue. They cannot be used to shift the burden of persuasion by creating a situation in which it is impossible for a defendant to rebut the *prima facie* case with respect to a particular plaintiff's claim because his evidence does not "preponderate enough" to overcome the general statistics. In the first place, such a finding creates an "apples-to-oranges" evidentiary comparison. It also commits the same error as the First Circuit in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), and the Fifth Circuit in *Burdine*, by glossing onto the employer's burden an additional requirement not intended or allowed by the established tests set out by this Court. In practical effect, no employer can defend even the most straightforward individual treatment case without also defending its practices across-the-board, regardless of whether those practices bear any relation to the challenged conduct.

**C. The Circuit Courts, and particularly the Eighth Circuit, have created confusion among courts and practitioners in the application of the McDonnell-Burdine formulation.**

The various circuit courts of appeals have variously applied *Burdine* and subsequent cases to the pretext stage of Title VII litigation. As has been shown, the Eighth Circuit, in the *Vaughn* case, has resolved the question of

discrimination *vel non* almost without discussion of *Burdine*. There is simply no consideration in *Vaughn* of the causal connection between the plaintiff's generalized *prima facie* case and the particular employment decision at issue. Instead, the appeals court somewhat reluctantly fell back on its often relied-upon appellate-review doctrine, merely expressing its reluctance to find that the district court's decision was clearly erroneous. (Pet. App. A-3, 4).

For some unexplained reason, the Eighth Circuit demonstrated a better understanding of the law in the earlier case of *Johnson v. Bunny Bread Company*, 646 F. 2d 1250, 1256 (8th Cir. 1981). In that case, the Circuit Court considered the appeal of two employees who unsuccessfully alleged discriminatory treatment as to working conditions and discharges. The Court, reflecting a proper distrust for marginally related evidence, "scrutinized closely" the generalized statistics offered to prove pretextual motive, and found that in light of the un rebutted evidence of legitimate reasons for the actions, the statistics were left "with little, if any, probative value." *Id.* at 1255. "Without additional evidence . . . the connection between [these statistics] and [Johnson's] discharge is too attenuated to compel a finding of [discriminatory] motive." *Id.* citing *Person v. J.S. Alberici Constr. Co.*, 640 F. 2d 916, 919 (8th Cir. 1981). The Court then searched the record for "additional evidence" that similarly situated white employees had been treated differently than blacks. Finding none, the Court held that the plaintiffs had failed to meet their third-stage burden.

In *Locke v. Kansas City Power and Light Co.*, 660 F. 2d 359 (8th Cir. 1981), the Court performed a proper analysis of the evidence similar to that employed in *Per-*



son, *Johnson and Middleton v. Remington Arms Company*, 594 F. 2d 1210 (8th Cir. 1979).<sup>5</sup> In properly finding pretext in *Locke*, the Court relied upon specific fact-findings related to the particular employment action in question and the credibility of defendant's articulated reason. There was no such analysis or similar evidence relied upon in *Vaughn*. The proper pattern that had appeared to emerge in the Eighth Circuit on the issue of pretext was simply not followed in *Vaughn*.

The best example of the confusion in this Circuit is illustrated by *Vaughn* and the two other Title VII cases argued to that same panel on the very same day, and decided within two months of each other. The *Vaughn* decision, of course, is before this Court, and its reasoning is set forth in Pet. App. A. The other cases argued along with *Vaughn* were *Robinson v. Arkansas State Highway and Transportation Commission*, 698 F. 2d 957 (8th Cir. 1983), and *Danzl v. North St. Paul Maplewood-Oakdale Independent School District No. 622*, 706 F. 2d 813 (8th Cir. 1983). In *Robinson*, the Court of Appeals relied upon *Burdine* and *Johnson, supra*, to find that the plaintiff had failed to establish pretext. In so doing, the Court considered carefully the facts surrounding the challenged employment decision. Although the plaintiff asserted strongly that her generalized evidence demonstrated pretext, it is notable that the Court dismissed this argument out-of-hand because she failed to "explain how such evi-

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<sup>5</sup>Before *Burdine* in *Middleton v. Remington Arms Co.*, 594 F. 2d 1210 (8th Cir. 1979), the Eighth Circuit considered it conclusive on the issue of pretext that the plaintiff was able to produce " 'not one scintilla of evidence' that he was treated any differently than other employees." *Id.* at 1213. Yet in *Vaughn*, both the trial and appeals courts candidly found that there was no such evidence presented by the plaintiff, but incredibly enough found the defendant guilty of unlawful discrimination nonetheless!

dence demonstrate[d] that her failure to be transferred was racially motivated. . . ." *Id.* at 958, citing *Johnson, supra*, at 1254-55. In other words, there was no causal link between that evidence and the challenged employment decision.

In *Danzl, supra*, the Court reversed the trial court's finding of pretext (on rehearing after remand in light of *Burdine*), relying heavily on the *McDonnell-Burdine* holdings that "[a]t all times the ultimate burden of persuasion that the defendant committed intentional discrimination remains with the plaintiff." *Id.* at 816. The key basis for the reversal in *Danzl* was the fact that the defendant's articulated reason for the difference in treatment was never contradicted, or, in effect, not shown to be a mask for unlawful discrimination. The same must be said of the defendant's reasons in *Vaughn*, but the result there was strikingly different. Importantly, the defendant in *Danzl* had a history of underrepresentation of women in administrative positions and had obligated itself under a national agreement between the United States Department of Health, Education and Welfare and the Women's Equity Action League to "make a conscious effort to select female administrators." *Id.* at 817. Despite generalized proof which favored the plaintiff, the Court nevertheless "thoroughly searched the record and . . . found nothing that supports the district court's finding of intentional discrimination." *Id.* at 818. The fact that it did not do likewise in *Vaughn* is the error which this Court must now rectify. If anything, the legitimate business reasons articulated for the challenged employment decision in *Vaughn* were much clearer and stronger than in *Robinson* and *Danzl*. There was not even diminishing, much less contradictory proof offered to rebut those reasons.



II. When the district court applied generalized evidence conclusively on the issue of pretext, a presumption of discriminatory animus and the corresponding burden to prove the lack thereof was imposed upon the petitioner effectively foreclosing the opportunity to rebut the inference drawn from the prima facie case.

In the case of Ms. Vaughn's disqualification, it is obvious that the trial court found certain "statistics"<sup>6</sup> and general testimony to be controlling, even in the face of unrebutted, individualized and specific testimony and exhibits establishing, as the trial court itself admitted, "that plaintiff's job performance did leave something to be desired." (Opinion on Remand, Pet. App. B-5). Thus, even though the court did not doubt "that the burnt wires documented by defendant in fact existed, or that production problems were a genuine concern", and with no evidence that the particular supervisor was motivated by anything other than those legitimate concerns, the Court held a second time that Ms. Vaughn "was disqualified in part because of her race." (Pet. App. B-5, 6).

**A. The evidence relied upon by the trial court to establish the pretext was not probative of the alleged discrimination.**

The error in this conclusion is best illustrated by a careful review of the record evidence relied upon by the District Court. In its original opinion (JA 326-329) the court catalogued in detail the proof held to support a *prima facie* case. The evidence relied upon was as follows: There had apparently been pre-Act discrimination against blacks, since virtually none had been hired before 1965. Only 3 of 22 office and clerical employees were black.

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<sup>6</sup>The word is placed in quotes because, as will be discussed *infra*, no true statistics and no numerical analysis were produced at trial.

Only 2 of 25 or 26 supervisors were black, and supervisory vacancies were not publicized. While blacks were hired roughly in proportion to their representation in the relevant population, the black representation in the workforce appeared to be artificially depressed. Black employees were concentrated in production jobs, which were lower-paying. Of the 31 management positions, only 2 were held by blacks. The criteria utilized for selection from among applicants appeared to be subjective. Finally, Ms. Wilma Donley, a Westinghouse employee from August 31, 1972 until August 28, 1978, gave "wide-ranging" testimony that she had observed harassment of black employees by supervisors, that blacks had far more grievances than whites concerning treatment at the plant, and that blacks were disparately assigned a greater share of work while white employees loafed in the bathroom. (JA 326-329).

In the Opinion on Remand (Pet. App. B-5), the trial court added the following evidence to the list:

"that almost all of defendant's supervisors, including the two men under whom plaintiff worked as a sealex operator, are and have been white; that most of the labor-grade-four sealex operators in 1971, where plaintiff was disqualified, were white (T. 15); that '(b)asi-cally all' the labor-grade-one bulk loaders (the lowest paying job to which plaintiff was demoted) were black (T. 17); that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O. D. Brazil, before her transfer to Mr. Turnage's shift; and that plaintiff had progressively been given pay increases, until several months before her disqualification, she had reached the top rate of pay available for that work."

Taking each of these findings in turn, the startling lack of relevance and probative force of this evidence be-

comes obvious. The findings relating to statistics are drawn from the testimony of Mr. Hunnicut, the plant personnel manager (taken as a Fed. R. Evid. 611(c) adverse witness) (Tr. 238-336), and from Plaintiff's Exhibits 1, 2, 3 and 5 (copies of Defendant's Answers to Interrogatories dealing with applicants/hiring, managers, supervisors, and discharges) (Tr. 275, 290, 309 and 320, respectively). There was no expert analysis of any of the statistics contained in these exhibits. In fact, they were admitted over the objection of the petitioner as to relevance and because respondent had not identified them as exhibits prior to trial as required by local federal practice rules. (See, Tr. 282-286, 275, 290, 309 and 320). The trial court admitted them into evidence for the purpose of evaluating the petitioner's motivation, recognizing that there was no longer any class-wide issue and that no plaintiff had a hiring claim or a claim of failure to promote to supervisor.

It has previously been noted that *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 805 n.19 (1973) cautioned against the injudicious use of generalized statistics in individual treatment cases. A similar *caveat* is found in *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 339, and n. 20, 340 (1977), wherein the Court explained that statistics, while useful, "come in infinite variety and, like any other kind of evidence, may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See, e.g., *Hester v. Southern R. Co.*, 497 F. 2d 1374, 1379-1381 (5th Cir. 1974)." The *Hester* Court found erroneous as a matter of law a finding of discrimination based upon "extravagant extrapolations" and abstract propositions, drawn from inconclusive testimony concerning the number of black applicants, rather than upon proof of discrimination. Statistics should be

viewed cautiously even when carefully analyzed and explained by experts. When introduced haphazardly and without any explanation, at a time when, because of surprise and the individual nature of the case, the defendant has no real opportunity to prepare an analytical rebuttal, they should be scrutinized even more closely and discounted accordingly if they do not relate to the issue, they should not be considered at all.

In *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 766-67 (5th Cir. 1983) (— U.S. — *appeal pending*), the Court held that, while generalized raw data, unanalyzed, may help to establish a weak *prima facie* case, no reasoned assessment or valid conclusion can be drawn therefrom. *Id.* Further, the court held that, if the plaintiff succeeds in establishing a *prima facie* case on this basis, the defendant has two methods available for rebuttal. He can choose to attack the statistics, either by discrediting the plaintiff's proof or by his own presentation, or he can advance "a non-discriminatory rationale for what appeared to be discriminatory conduct." *Id.* at 766. This latter method is precisely what was foreclosed by the trial court in *Vaughn*. By requiring defendant to disprove any causal connection between the statistics and the disqualification of *Vaughn*, the trial court created a "revolving door", through which the respondent's generalized evidence kept appearing, overcoming all of the facts which could ever have been produced by the petitioner in support of the decision by Mr. Turnage, Vaughn's supervisor. In effect, petitioner never overcame the *prima facie* case because the court had drawn an impermissible inference and then allowed it to preponderate over the specifically focused evidence of the petitioner.

The Court of Appeals for the Fourth Circuit, in *E.E. O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633,

645-47 (4th Cir. 1983) (— U.S. — *appeal pending*), expressed a similar trepidation in its approach to the use of statistics. There the Court disapproved an expert analysis because the test that was applied was of limited value. The Court noted that rebuttal of statistics may take a number of forms, concluding that “in no case should there be a blind adherence to the proposition that mere statistical imbalance equals discrimination.” *Id.* at 646. Quoting *Teamsters, supra*, the Court held that such evidence may be rebutted by “demonstrating that [the plaintiff’s] proof is either inaccurate or insignificant.” *Id.* Petitioner here earnestly submits that the primary if not the only way to establish that generalized statistics are insignificant in an individual treatment case is to present the reasons for the challenged conduct. Once that is done, the inference arising from the statistics, as from the *prima facie* case in general, drops from the case, and the plaintiff must come forward with some evidence (if it intends to rely primarily on generalized evidence) which establishes a causal connection between the generalized proof and the challenged conduct.

The trial court in *Vaughn* next discussed the allegedly subjective criteria used in hiring and the disparity of hiring rates between black and white applicants. (JA 327). It is true that petitioner did not seek to explain these statistics. It was at the time no longer faced with any class issues, but only faced with the individual treatment cases of three employees, none of whom had a hiring claim. Moreover, the plaintiff Vaughn had been hired as a labor-grade-four sealex machine operator, well-above entry-level, and so had, therefore, apparently suffered neither hiring discrimination nor discrimination in her initial assignment. (DX 35v, JA 292). Petitioner



could logically assume, especially since the respondent had no expert witness and had totally failed to identify any exhibits, statistical or otherwise, prior to trial, that it could avoid the exorbitant expense of a statistical rebuttal such as would be required in a class action suit. These unrelated statistics were simply not probative on the issue of Vaughn's disqualification for excessive wasted product. There was no proof that Vaughn's plant foremen had anything to do with the hiring process. There was not any proof that he had consulted with persons who did the hiring before he disqualified Vaughn. There is no factual basis for concluding that he was motivated by anything other than her poor performance, notwithstanding the company's hiring statistics.

If every individual case must be tried as though it were a class action, even though there is direct factual rebuttal evidence on the particularized conduct, the federal courts will quickly become bogged down in a quagmire of marginally-relevant statistical proofs which serve only to increase the expense and time required to decide such cases, while providing little to aid the trier-of-fact in those decisions. Court decisions like the one in *Vaughn*, which turn their backs on the individual facts of the employment decision in question, overemphasize the non-related statistics and produce this judicial backlog.

The next element of the *prima facie* case in *Vaughn* was the testimony of Wilma Donley. (JA 328). Ms. Donley's testimony is found at JA 56-126, and was included in the Appendix at the request of the respondent. Although this evidence seemed important to the trial court, petitioner is at a complete loss to explain its relevance to Vaughn's disqualification. First, Ms. Donley was not even employed at Westinghouse until August 31, 1972 (DX 63, JA 153), *more than one year after Vaughn had*

been disqualified as a sealex machine operator on April 19, 1971. (DX 41, JA 312). Ms. Donley had absolutely nothing derogatory to say about Mr. Turnage, Vaughn's disqualifying supervisor, even though she had worked under him. (JA 91). Instead, she named two supervisors she thought had mistreated employees, Mr. Birch (JA 58-60) and Mr. Maynard (JA 66), but in neither case did she even say that their treatment was racially motivated. She did not identify a single supervisor who had ever used racially derogatory remarks, including Mr. Skelly, her principal supervisor with whom she had almost daily contact. She complained that employees were put on jobs without sufficient training (JA 68), but she did not state that blacks were treated differently than whites in this respect. She claimed that black employees were required to do utility work while the utility girls, most of whom were white, lounged in the bathroom. (JA 74). She only knew this because she was in the bathroom with them. She did not indicate whether any Westinghouse supervisor even knew of this rather common plant problem. She gave not a single instance where any of petitioner's employees directly or openly mistreated blacks, or used racial slurs, or otherwise created overtly discriminatory conditions. The court credited her testimony that she served as some sort of "ombudsman" for black employees (at the request of the union president, who was concerned that black employees saw him as prejudiced) (JA 96), but she had filed only one grievance during her tenure as a shop steward. (JA 90). She had never filed a grievance for a white employee. (*Id.*) Most of her activities in this respect were informal and unofficial, and there was no evidence that the petitioner knew of them. Most of these activities, including her taking some thirteen unidentified (JA 83, 117) black employees



to a lawyer to initiate an action for discrimination, were accomplished while she was off work on maternity leave. She could not remember names or dates regarding virtually all of her testimony. (*See e. g.* JA 124). And even as to the one case as to which she was specific, she testified that Mr. Harris, the black employee, was asked to do a common task required of all employees (JA 93), and that the supervisor was under a lot of job-related pressure because of machine breakdowns at the time of the incident. (JA 94). In short, her testimony is virtually valueless and cannot be considered probative even of a racially-discriminatory environment, much less as specific support for Vaughn's totally unrelated *prima facie* case. Her entire testimony should be read, too, with the understanding that during her six years of employment, she had never been disqualified or disciplined for job performance and was terminated only after it became obvious that she could not perform the job because of undisputed bad attendance. She had missed more than thirteen months of work during her six years of employment. (DX 63). As was held in *Hester v. Southern R. Co.*, 497 F.2d 1374, 1380 (5th Cir. 1974), "[t]he value of [her] testimony is seriously undermined by its subjectiveness and lack of precision."

The trial court's Opinion on Remand reiterated some factors and suggested others which, in the court's opinion, overcame petitioner's rebuttal and established pretext (Pet. App. B-5):

"Almost all defendant's supervisors . . . are or have been white."

This evidence is directly probative only as to discrimination in promotion to supervisor, an allegation not in issue here. It may also create a perception of discrimination among minority employees, and may warrant

closer scrutiny of supervisory decisions by the trier-of-fact. Certainly the court may not infer, however, that because a supervisor is white, he or she must necessarily discriminate against blacks. Particularly the court may not infer such animus on the part of the supervisor in question, Mr. Turnage. The testimony of Donley and of the plaintiffs below did identify some supervisors whom they thought were discriminatory. To Mr. Turnage's credit, however, not a single witness gave an instance where he had ever mistreated a black employee or had even appeared to be prejudiced. In fact, Ms. Vaughn herself did not complain about Turnage, and did not believe he had discriminated against her. Vaughn's own testimony makes this clear.<sup>7</sup>

The Court's Opinion on Remand continues:

"that most of the labor-grade-four sealex operators in 1971, when plaintiff was disqualified, were white (T. 15)".

(Pet. App. B-5). The court directs our attention to the testimony of Ms. Vaughn in support of that proposition. Her testimony, in the form of an obscure and hesitant estimate, without accompanying numbers or identification of persons, shifts, or areas of the plant, is valueless. It is also quite similar to that disapproved in *Hester, supra* at 1380. When asked the number of blacks or whites working sealex on her shift, she stated, "I

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<sup>7</sup>Q. "So, only as to you, you feel like Westinghouse—[discriminated] against you by Mr. Brazil's treatment?" A. "Yes, and that is—to that question, yes." THE COURT: "Maybe I misunderstood the testimony, but it was Mr. Turnage who told you you were disqualified?" THE WITNESS: "Yes." THE COURT: "Is it your contention that he did that because of race?" THE WITNESS: "No, Mr. Turnage told me I was disqualified as to a notice from the front office. I do not feel that Mr. Turnage himself disqualified me. . . ." \* \* \* THE COURT: "So your main complaint, at least relates to Mr. Brazil?" THE WITNESS: "Yes." (JA 51, 52).

can't—they possibly—it was more whites than blacks. We had very few black sealex operators then.” (JA 35). Without some form of analysis or corroborating numbers, a court should be very hesitant before drawing finite conclusions from such flimsy evidence. And it is a plaintiff's, not a defendant's, burden to produce such evidence and analysis. *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 768 (5th Cir. 1983).

“that ‘basically all’ the labor-grade-one bulb loaders . . . were black (T.17);”

(Pet. App. B-5). Again, the trial court cites only the testimony of Vaughn in support of that finding. There is again no number given, no shift identified, and no hint by the witness that she found this to be discriminatory. (JA 36). When asked about specific instances of discrimination, she was even less definitive. (JA 38). To think that such evidence as this could preponderate on the narrowly focused issue of her disqualification is beyond belief. It could not and would not unless the burden to preponderate has been improperly placed upon the defending party.

Further, even assuming that such testimony might have value in some cases to support a plaintiff's pretext case, it has none here. It is clear from the court's own findings, the testimony of the plaintiffs, and the exhaustive testimony of Mr. Hunnicutt, the plant manager (JA 127-217) (Tr. 437-539), that the jobs referred to by the court are filled according to seniority on a job-bid system. Since the system itself was not challenged as discriminatory or as not *bona fide*, no more specific evidence was adduced on the point. But it is clear that supervisors, because of the seniority system, have almost no authority over promotions, excluding past disciplinary or documented production problems. Drawing a conclusion

that one of those supervisors used race as a factor in disqualifying the respondent, based upon such generalized and vague proof regarding hiring and assignments is simply more "extravagant extrapolation". *Hester, supra* at 1381.

"that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O. D. Brazil, before her transfer to Mr. Turnage's shift."

(Pet. App. B-5). This evidence comes closest to going to the issue of pretext. Absent any explanation, it might appear that the petitioner had described respondent's performance as satisfactory and then unsatisfactory within the span of a few months. But the evidence did not appear without explanation. First, Vaughn herself testified that she had had problems on the sealex and had been counseled by both Mr. Maynard (JA 26) and Mr. Brazil (JA 51-52, 48). The petitioner produced accepted evidence that the January 18 memorandum was inadvertently erroneously recorded, and produced a contemporaneous form (DX 36) (JA 293-4) written by Supervisor Brazil in January of 1971, that indicated he would not rehire her as a sealex operator because she "cannot get production" and her quality and quantity of work were "poor". Her weakest point was described as "absenteeism and late too often." (JA 294). Further even if that rebuttal evidence was not believed, it could at best only indicate, and so the court found, that she was not so unsatisfactory on Brazil's shift as to warrant disqualification. It says nothing about her performance on Turnage's shift, a late-night shift and job which she expressly disliked and in which she performed poorly. (DX 37, JA 302). Once, in fact, in the presence of a shop steward, Vaughn appeared to fall asleep while being reprimanded

by Turnage for poor performance shortly before her disqualification. (DX 39, JA 309).

“and that plaintiff had progressively been given pay raises, until several months before her disqualification, she had reached the top rate of pay available for that work.”

(Pet. App. B-5). That evidence, too, might support a finding of pretext, if viewed in a vacuum and if, from that showing, one could infer meritorious performance or that the testimony of Brazil and Turnage was *not* credible. But, as before, there was other evidence on the point. Defendant's Exhibit 2, Exhibit A (JA 268), establishes that an operator in Labor-Grade-Four reaches the top rate of pay in fourteen weeks from the date employed, provided he maintains a minimum level of production. The raises are based on minimum or satisfactory performance, not merit. Vaughn received all of her rate increases under Mr. Maynard, *before* transferring to Mr. Brazil's shift (DX 35q-v, JA 287-292). She did not receive a pay raise from either Brazil or Turnage. Further, all of her pay increases were on the earlier second shift, which she admittedly preferred. That evidence then, is simply not probative of pretext because it does not contradict the testimony of either supervisor.

As a final factor, the trial court noted that Turnage had not testified that Ms. Vaughn's race was not a factor in his decision. (Pet. App. B-6 n.5). The court viewed this as unusual, and apparently found it to be a prerequisite to a finding for petitioner. Petitioner knows of no cases by this Court which require self-serving affirmations. In fact, *Teamsters* discourages their use.

**B. Petitioner's rebuttal evidence went directly to the conduct in issue, and established factually that discrimination was not a factor in the challenged decision.**



In rebuttal, the petitioner presented in addition to the evidence outlined above, the following:

Mr. Clint Turnage, the disqualifying supervisor, testified that he had been a supervisor for about four years. (JA 218), and before that had been Vice-President of the employees' union and a production employee. (JA 219). At the time of his testimony, he was President of the union, elected by his fellow employees. (JA 219). Yet, the trial court attributes to him a racially-biased attitude and finds him guilty of intentional discrimination against at least one member of that union.<sup>8</sup> He testified concerning his notes made concurrently with warnings given to Vaughn on five separate occasions. (DX 37, 38, 39 and 40, JA 296-311). He explained that Vaughn had expressed a dislike for her job. (JA 223); that she had missed a number of sealing heads and exhaust ports and was getting too many burned light bulb filament wires (JA 224); that he had monitored her work closely, and monitored the production and error rates for other operators and other shifts, and informed her specifically of those numbers (JA 225, DX 39, 38, and particularly 37, JA 299); that she had appeared to fall asleep while he was counseling her about her performance (DX 39, JA 309); that, in all but one of the counseling sessions, a shop steward had been present; and that, after all of those warnings, there was no sustained improvement in her performance. (JA 226). Much of the trial court's reluctance to give this testimony a preponderant weight came from the court's notion that the evaluations of her performance were subjective. This conclusion was drawn from the finding that the petitioner had not "set a

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<sup>8</sup>It should be noted that, as President of the union, he presumably was a participant in agreeing with the respondent to sign a consent order dismissing the union from this lawsuit. (See style of complaint at JA 5).

numerical standard of production, communicated it to employees, and enforced it uniformly." (Pet. App. B-6). That finding comes one sentence before the court found that "Turnage *did not act objectively* in the sense of counting and documenting the number of plaintiff's burnt wires, but he never communicated to her any fixed number that she could not exceed, nor did he testify as to what the number might have been." (Pet. App. B-6) (emphasis added). In the first decision, the trial court noted that Vaughn "unquestionably had problems with production, but the absence of objective production criteria makes it difficult for the court to hold that these problems were serious enough to meet the burden imposed upon the defendant by law." (JA 338). It is clear that the court placed heavy emphasis on the lack of positive objective criteria, in fact so much so that it found the *negative* production figures—the number of burned wires—to be unacceptable as a standard at all. (See e.g. Pet. App. B-6, n.4). Petitioner maintains that the trial court has entered an area of unbridled judicial interventionism when it chooses the "better" of available objective standards and imposes liability solely because the defendant chooses another alternative, which is just as measurable and specific. This is the worst form of hindsight, made worse by the fact that the court is in reality simply looking over the shoulder of a first echelon supervisor and attempting to impose a substitute standard for the perfectly lawful one chosen by that supervisor. Yet, when fashioning a remedy, the very court which was so quick to declare the standard to be discriminatory and subjective declined to impose objective standards upon the petitioner.<sup>9</sup> Was not the trial court itself practicing a

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<sup>9</sup>The court felt it had

"neither the inclination nor the talent to involve itself in management decisions of this nature. Such objective

(Continued on following page)



double-standard in taking this obviously contradictory approach? It is manifestly unfair to impose liability based upon criteria which the court itself finds to be impractical to apply, and "[un]necessary to vindicate the statute." (JA 342). There is no evidence to discredit petitioner's explanation of Vaughn's disqualification. It was Turnage who made the decision. Now, in retrospect, he is told by the trial court that he based his decision "in substantial part" on her race, even though there is absolutely nothing in the record regarding this or any other decision he has ever made which supports that finding. Moreover, there was no evidence that anyone other than Mr. Turnage had anything whatsoever to do with his decision to disqualify her.

With respect to his other decisions, even though it is plaintiff's burden to produce the "especially relevant" litmus comparison of similarly situated employees, the respondent produced no evidence that white employees with problems similar to Vaughn were ever treated differently, or that Turnage himself had favored some employees over others, white or black. Petitioner on the other hand, as a part of its rebuttal produced the evidence that, of the three employees that Turnage had disqualified or failed to qualify as a supervisor, two were white and only one, Vaughn, was black. (JA 230-232).

Petitioner also produced evidence, through Mr. Brazil's testimony, that Vaughn tended to have to be prodded to perform any peripheral duties (JA 242-3); that as a sealex operator she couldn't keep light bulb heads full on

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(Continued from previous page)

statistical criteria for job performance, though they no doubt could be devised, would inevitably present difficult questions of application to individual cases, unless they are to be mechanically applied in every instance, without regard to the circumstances of individual employees." (JA 341-42).

the sealex, resulting in poor production (JA 244); that when warned about her poor performance, she did not improve (JA 245); that she had a "continuing problem" with attendance and coming in late (JA 245); and that she had been issued written warnings and other discipline in subsequent positions under his supervision (JA 246-47, DX 46a and b), and her problems again did not improve (JA 248). After hearing that evidence, however, the trial court chose to give weight only to the personnel form which indicated that she had had "previous satisfactory experience." Worse, the court found that kind of evidence to preponderate, even though convinced that Vaughn's production problems were real. (Pet. App. B-5). Simply put, the court imposed upon petitioner the court's own brand of business judgment that Vaughn's poor performance did not warrant disqualification. Said the court, "[i]f the issue were narrowly confined to evidence bearing directly on the decision to disqualify the plaintiff, there is no question that defendant would prevail." (Pet. App. B-4). But under this Court's pretext guidelines the question was so confined. *Burdine* requires that, at the pretext stage, the proof must be more narrowly focused, more resolutely aimed, than in the *prima facie* case. This is because the sole purpose of the pretext stage is to give the plaintiff an opportunity to show that the reasons proffered by the defendant are a sham, a mere facade hiding the true discriminatory motives of the decision-maker. If the issue is not "narrowly confined" to that determination, there is no need for the pretext stage at all. Instead, as happened here, the court is free to draw any conclusion it chooses from the *prima facie* case, no matter how remote or generalized that evidence may be in relation to the conduct in question.

C. The trial court disregarded Petitioner's explanation, and did not require Respondent to meet her burden of persuasion on the issue of pretext.

It is true that even though a defendant articulates a legitimate reason, the court is free to hold that the articulation was pretextual and can consider the *prima facie* evidence on that issue. *Burdine, supra* at 255, n. 10. It is not true, however, that once a defendant has rebutted the *prima facie* case with respect to a particular plaintiff or claim, the court is free to disregard the rebuttal simply because the court remains somehow unconvinced that the employer's reasons were lawful. It is rather the plaintiff's burden to establish that the reasons were unlawful. Were it otherwise, the requirement of *Board of Trustees of Keene State College v. Sweeney*, 439 U. S. 24 (1978), that a defendant need not prove the absence of unlawful motivation, would be relegated to mere semantics. No defendant would be able to defend a treatment case unless every conceivable factor, however remote and speculative, which might have affected the employment decision had been rebutted.

In the context of the *Vaughn* case, the trial court, in essence, required the petitioner to prove that the original but highly attenuated motive presumed from the *prima facie* case was not a factor in the employment decision. The court's finding that race was more likely than not a factor in the decision was simply another way of saying that, while petitioner proved that it had a valid reason for its actions, it failed to prove that there was not an invalid reason also operating. This imposed a burden which *Sweeney* and *Burdine* hold should not be imposed. As Judge Fagg said in his dissent in the second appellate decision, in words more succinct and telling than any the petitioner could offer:

"I disagree that the evidence in the record demonstrates that Vaughn met her burden of proving by a preponderance of the evidence that Westinghouse's reason was a pretext for discrimination. See *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U. S. at 252-53.

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The focus of this case is on the graveyard shift and the evidence is one-sided in favor of Westinghouse. . . . Based upon the record, I feel we are obliged to find that Vaughn disliked the late shift, she was underachieving on the sealex machine, and she was not motivated to improve upon an unsatisfactory performance notwithstanding the wasteful and costly consequences to her company.

In my view Vaughn failed to meet her burden of persuasion that a discriminatory reason was the basis for her disqualification and transfer to a lower paying job and the district court's ruling to the contrary is clearly erroneous." (Pet. App. A-4-A-6) (Fagg, Circuit Judge, dissenting).

**III. Even if a court concludes incorrectly that there was discrimination generally affecting the particular employment decision, if the defendant has destroyed the causal connection by showing as a part of its rebuttal that the decision would have occurred even absent the discrimination, there is no liability under Title VII.**

Petitioner does not believe that a racial motive was established by respondent with respect to Turnage's disqualification of Vaughn. Petitioner strongly urges that evidence of the nature relied upon by the trial court and affirmed by the Court of Appeals, should never be used as a basis for a finding of intentional conduct in the face of a rebuttal which has not been shown to be false, and which the court itself believed. (Pet. App. B-5, n. 5). But *Burdine*, *Aikens*, and other cases from this court suggest that such evidence, "and inferences properly drawn therefrom

may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Burdine, supra*, at 255, n. 10. (emphasis added). The point has already been argued that, in effect, the inference drawn by the trial court here was not proper, inferring more than could be inferred from evidence not probative on the issue before the court. Another question, however, is raised at the pretext stage, either when a proper inference can be drawn or when, as here, it has been incorrectly drawn. The issue is whether, given that race may have been a factor in the employer's decision, what additional inquiry, if any, must a court make to resolve the ultimate fact issue of whether the plaintiff has suffered from intentional discrimination?

**A. This Court has not addressed a "dual motive" case under Title VII.**

The Supreme Court has never squarely addressed the "mixed" or "dual motive" question in a Title VII disparate treatment case. The question has been addressed quite recently, however, in a case involving a claim of unlawful discharge for union activities, in violation of §§ 8 and 10 of the National Labor Relations Act.<sup>10</sup> *National Labor Relations Board v. Transportation Management Corp.*, — U. S. —, 103 S. Ct. 2469 (1983). There the Court held that

"If the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons he offers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause."

*Id.* at —, 103 S. Ct. 2472.

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<sup>10</sup>29 U. S. C. §§ 158, 160.



The narrow question before the Court was whether it was proper for the National Labor Relations Board to consider the employer's assertion, that the anti-union animus made no difference in the result, as an affirmative defense, and in so doing impose a burden of persuasion upon the employer to establish that fact by a preponderance of the evidence. Put another way, could the Board impose upon the defendant a burden similar to that imposed by courts in cases arising under the First Amendment to the Constitution of the United States? *Mount Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977).<sup>11</sup>

An essential prerequisite to imposition of the *Mount Healthy-Wright Line*<sup>12</sup> burden upon a defendant is that a plaintiff (the General Counsel) first establish by a preponderance of the evidence that anti-union animus was a factor in and contributed to the employer's decision to discharge an employee. 103 S. Ct. 2471. Then, even if the employer "failed to meet or neutralize the General Counsel's showing, [it] could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union." *Id.*

In so holding, this Court expressly distinguished the third-stage or pretext burden in Title VII cases after

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<sup>11</sup>The *Mount Healthy* test answers the question of whether "but for" the unlawful discrimination, the conduct would not have occurred, by placing a burden "on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights." *National Labor Relations Board v. Transportation Management Corp.*, *supra*, at —, 103 S. Ct. 2475.

<sup>12</sup>*National Labor Relations Board v. Wright Line*, 662 F. 2d 899 (1st Cir. 1981) (cert. denied 455 U. S. 989).

*Burdine*, finding that reasoning "inapposite" in a dual motive case. *Transportation Management, supra*, at —, 103 S. Ct. 2473 n. 5. Thus it is clear that the burden of persuasion does not shift in a Title VII case, at least until pretext or racial animus is established as one of the factors influencing the employer's decision. Imposing a burden of persuasion on the defendant before the plaintiff's proof has clearly established this animus is error.

**B. The Circuit Courts which have addressed the issue have resolved it differently.**

The Court of Appeals for the District of Columbia Circuit addressed this question in *Toney v. Block*, 705 F.2d 1364 (D. C. Cir. 1983). There, in a case involving a federal employee who had exhausted formal administrative procedures, the plaintiff sought to impose upon the employer the burden to establish by clear and convincing evidence that an unlawful factor was not the determinative one. The Court agreed that this burden would be appropriate in the circumstance where "the plaintiff had established [before an administrative tribunal] that unlawful discrimination had been applied against him *in the particular employment decision for which retroactive relief was sought.*" *Id.* at 1366. (emphasis the Court's). It was not fair, however, to impose that burden upon an employer when discrimination at large, but not in the specific conduct, had been shown. *Id.* at 1366, 67. The Court relied upon the language in *Burdine, supra*, to hold that demonstration of discrimination at large constitutes, for purposes of individual relief, no more than the *prima facie* case that shifts the burden to the defendant to give a justification. Once the defendant produces a reason, the plaintiff may use the



generalized proof to prove pretext, but it is plaintiff's ultimate burden to prove it, not defendant's burden to prove the opposite. *Id.* at 1367-68.<sup>13</sup> The Court's discussion of the use of generalized evidence of discrimination at-large to establish a *prima facie* case disapproved the imposition of any burden upon the defendant which shifted the burden of persuasion. *Toney, supra*. Thus the Court declined to impose a "fourth-stage" burden in individual disparate treatment cases.

The Court of Appeals for the Eleventh Circuit has addressed this same question, but resolved it differently. In *Perryman v. Johnson Products Company, Inc.*, 698 F. 2d 1138 (11th Cir. 1983), the Court carefully set forth its view of the allocation of burdens after *Burdine*. In its view, the plaintiff may attack defendant's articulated reasons under either of the theories described in *Burdine*, and, if successful, create a new presumption of discriminatory intent that may only be rebutted by a showing by the employer that the adverse action would have been taken even in the absence of discriminatory intent. *Id.* at 1142.

**C. Petitioner produced evidence concerning similarly situated white employees and resolved the "dual motive" question by establishing that race was not a factor in the decision.**

Petitioner raises these points to urge that this Court avoid adding additional formal stages and tests to the individual disparate treatment case. If individual courts choose to view the evidence in one way or another in order to resolve the ultimate issue described in *United States Postal Service Board of Governors v. Aikens*, — U. S. —,

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<sup>13</sup>The *Toney* Court viewed the *Day v. Williams*, 530 F. 2d 1083 (D. C. Cir. 1976) (per curiam), formula as going to the issue of remedy, not liability. See, e. g., *Milton v. Weinberger*, 696 F. 2d 94, 98 (D. C. Cir. 1982).

103 S. Ct. 1478 (1983), that is their prerogative, as long as they remain true to this Court's pronouncements. *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), accomplished enough in this regard when it instructed courts as to what evidence was especially relevant, and what was less relevant or probative, on the issue of pretext in an individual case. Considering the evidence according to its degree of relevance or probativeness, in the more narrowly focused manner required by *Burdine*, would accomplish the same result as a formalized shifting of the burden of persuasion. But, even if this Court chooses to require another stage of proof, it must nevertheless reverse the decision in the instant case. The petitioner, choosing not to take the expensive and wasteful path of rebutting marginal inferences from generalized proof, aimed its defense directly at the employment decision in issue. It introduced evidence, considered especially relevant in *McDonnell Douglas*, of how similarly situated employees had fared in similar circumstances.<sup>14</sup> It gave legitimate, objective business reasons for its conduct.

A final point needs to be made concerning the force and effect of the *prima facie* evidence. The trial court relied upon the very same generalized evidence to establish the *prima facie* case for all three plaintiffs in its original opinion. (JA 324-330). Yet the Court did not deem such evidence to be sufficient to show pretext as to the other plaintiffs and dismissed all of their claims. Petitioner asserts that the evidence could not have been more probative

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<sup>14</sup>It did so even though it was the respondent's "task to demonstrate that similarly situated employees were not treated equally." *Montgomery v. Yellow Freight System*, 671 F. 2d 412, 413 (10th Cir. 1982) (quoting *Burdine*, *supra* at 248), and even though respondent had failed to do so. The trial court found that "no proof was offered to the effect that a white person with a work record comparable to Ms. Vaughn's was kept on the job." (Pet. App. B-4).

as to Ms. Vaughn, and in fact was even more remote to Vaughn than to the claims of Gee and Crutcher as explained herein. The generalized *prima facie* proof was not considered convincing as to the other plaintiffs or on any other issue—it should not be sufficient here. Only this Court can now correct that remaining error.

**IV. The decision below, besides its legal faults, is clearly erroneous on the facts and is unsupported by any relevant evidence.**

While the foregoing analysis clearly establishes a basis for reversal, this Court may also hear a case under its supervisory powers to right a glaring wrong. Petitioner is aware of the Court's recent pronouncements on the application of the "clearly erroneous" doctrine in Title VII cases, *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), but justice demands that cases should be decided on the evidence, and not based upon the subjective feelings of the trier-of-fact. The Court of Appeals in *Vaughn* determined that "[t]his is a close case and it may well be that the panel, if sitting as the trial judge, might have found that Westinghouse's proffered reason for plaintiff's disqualification was not pretextual." *Vaughn, supra*. 702 F. 2d at 139. (Pet. App. A-4). The Court nevertheless felt constrained by the standard of review set forth in Rule 52(a), Fed. R. Civ. P., to affirm. While the Court expressed a hesitance to disturb the findings and decision of a trial court, it had no hesitation about affirming a decision which disapproved an employer's business decision simply because it did not satisfy the trial court's belief that there was a better way to arrive at the decision, using "objective" factors.<sup>15</sup>

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<sup>15</sup>Judge Gibson, in his dissent in the first appeal (JA 356-57), urged that Title VII was never intended to require "uni-

On such a record, there was simply no evidence to support a finding that Turnage's decision—and his was the only decision then in dispute—was based even in part on unlawful racial considerations. Westinghouse has been forced to pay tens of thousands of dollars in attorney's fees, costs and backpay to an employee who did not like her job and would not perform it, and who, to this day, still declines to try the job again. Logic and fairness demand a reversal of this result.

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### CONCLUSION

Circuit Judge Floyd R. Gibson filed a dissenting opinion when this case was before the Court of Appeals the first time. His words are equally applicable now:

These facts are devoid of any connotation whatsoever of racial discrimination. The only discrimination against Vaughn was because of her poor and sloppy work. The Civil Rights Act of 1964 is not thought to have been passed to preserve sinecures for people, regardless of their race, who do not want to perform reasonably satisfactory work. Vaughn's productivity record was the worst of any of the operators. The Act here is being utilized as a shield to protect and reward sub-standard performance. (Gibson, J., dissenting) (JA 358).

The trial court and the Court of Appeals have had ample opportunity to correct this injustice. They have

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(Continued from previous page)

form production standards" or to mandate "how businesses should produce their products. This requirement would result in government supervision of each and every stage of the production process." Petitioner thought that such a criterion for finding liability was foreclosed by *Furnco, supra*, 438 U. S. at 572, which held that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."

declined to do so. Petitioner earnestly prays that, for the foregoing reasons, the judgments and bare majority opinions of the Courts below, which improperly find the petitioner liable for discrimination against Christine Vaughn, should be reversed with instructions to enter judgment for the petitioner.

Respectfully submitted,

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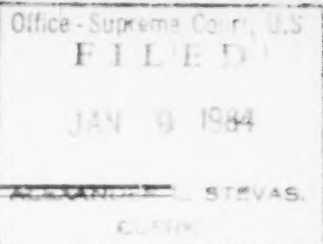
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No. 82-2042

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

WESTINGHOUSE ELECTRIC CORPORATION,

*Petitioner,*

v.

CHRISTINE VAUGHN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE RESPONDENT**

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## QUESTIONS PRESENTED

1. Once a defendant has articulated a legitimate non-discriminatory reason for its challenged conduct, is the court limited in the type of evidence it may consider in determining whether that articulation is pretextual?

2. Whether the district court's finding of discrimination, affirmed twice by the Court of Appeals, was clearly erroneous?

3. When discriminatory animus has been shown to have been a substantial factor in an employment decision, can an employer escape liability under Title VII by showing that other factors played a part in the employment decision?



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No. 82-2042

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN

Respondent.

---

On Writ of Certiorari to the United  
States Court of Appeals for the  
Eighth Circuit

---

BRIEF FOR THE RESPONDENT

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Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A to the Petition for Certiorari (Pet A) and is reported at 702 F.2d 137

(8th Cir. 1983). The opinion of the United States District Court for the Eastern District of Arkansas appears in Appendix B to the Petition for Certiorari (Pet B) and is reported at 523 F. Supp. 368 (E.D. Ark. 1981). The initial opinion by the court of appeals (Joint Appendix (J.A.) 346) is reported at 620 F.2d 655 (8th Cir. 1980). The initial opinion by the district court (J.A. 324) is reported at 471 F. Supp. 281 (E.D. Ark. 1979).

#### Statement of the Case

This lawsuit was filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to redress claims of discrimination in employment on the ground of race.

The respondent, Christine Vaughn, a black female, was hired by the petitioner, Westinghouse Electric Corporation, on July

13, 1970, as a sealex machine operator, labor grade 4 (J.A. 24). Ms. Vaughn functioned as a sealex operator under the supervision of Mr. Roger Maynard (J.A. 27) and, under his supervision became a fully qualified sealex machine operator on November 16, 1970 (J.A. 249-250; Tr. 685, 646-47). On that day she transferred to the second shift under the supervision of Mr. O. D. Brazil (J.A. 287, DX 35a).

Mr. Brazil had been the subject of a number of employee complaints (Tr. 523; J.A. 152-153) and had been counselled by both petitioner's chief personnel officer, W.T. Hunnicutt, and the plant manager (Tr. 683-84). Respondent Vaughn encountered considerable difficulty under Brazil's supervision due to the disparity in treatment he exhibited toward black and white employees (J.A. 38-39). She complained on several occasions about harassment by



Brazil to the petitioner's personnel officer, but to no avail:

[H]e was constantly on more blacks ... than he was whites. It was some whites that he gave problems, but basically, blacks.

(Tr. 11; J.A. 31). After seeing no results from her complaints to management, Ms. Vaughn filed a charge with the EEOC (Tr. 12; J.A. 32). Thereafter, Ms. Vaughn's activities came under close company surveillance (Tr. 13; J.A. 32-33). <sup>1/</sup>

The principal concern Mr. Brazil expressed regarding the respondent involved Ms. Vaughn's attendance record, and he wrote two memos to the file on that subject (J.A. 246; DX 460a, b). Although Brazil testified that he was also unhappy

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<sup>1/</sup> The record in this case also reveals the experience of another black employee, Glenda Crutcher, who apparently was identified as a "trouble-maker" under one supervisor and became the object of close scrutiny under another. (Tr. 350-363).

with Ms. Vaughn's level of production, he never documented these concerns. A written contemporaneous expression of his view of her competence to perform the job, signed by both Ms. Vaughn and Supervisor Brazil on January 18, 1971, reveals that he was satisfied with her performance (J.A. 295, DX 36). However two days later Mr. Brazil wrote another memo indicating his dissatisfaction with Ms. Vaughn's performance (J.A. 293-4; DX 34). At no time has Brazil or any witness for petitioner sought to explain away these contradictory evaluations of Ms. Vaughn's performance.<sup>2/</sup>

On January 25, 1970 Ms. Vaughn was again transferred, this time to the third

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<sup>2/</sup> In its brief petitioner now contends that the January 18 memo was "inadvertently erroneously recorded," however there is nothing in this record to support that contention. Petitioner also introduced into evidence a "bump sheet", which indicates where an employee may be placed in the event of a reduction in force, dated

shift under the supervision of Mr. Clint T. Tusnage (J.A. 28, 286, DX 35p). Ms. Vaughn testified that she was aware that employees were expected to make a certain rate of production but had never been advised that excessive waste could be a cause for disqualification (J.A. 43). Turnage testified that Vaughn had been warned on several occasions about inadequate production and excessive shrinkage (J.A. 224). He conceded that he did not tell Ms. Vaughn what production standard she was expected to achieve, (J.A. 224) but asserted that she had been warned about the shrinkage problem (J.A. 224). Petitioner introduced some handwritten notes Turnage claims to have made at

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2/ continued

December 8, 1975, which designated Vaughn as qualified to hold the position of sealex machine operator by virtue of prior satisfactory performance. Petitioner claimed this document to be the result of a clerical error (J.A. 136-138; DX 45).

the time he discussed production and shrinkage with Ms. Vaughn, but it declined to offer corroborating testimony by any of the union shop stewards Turnage claimed were present at those meetings with Ms. Vaughn.

On April 19, 1971, Mr. Turnage disqualified Ms. Vaughn as a sealex operator. He communicated this decision directly to Ms. Vaughn but told her he had been notified by the front office to disqualify her (J.A. 51). However, Turnage not only disqualified respondent but he also decreed that she would never in the future be eligible to become a sealex operator (J.A. 312, DX 41). Her position was then filled by a white employee (J.A. 35).

There is no indication in the record that disqualification always carries with it a stipulation that the employee could never in the future be given an opportunity to requalify. Petitioner's personnel

officer explained that permanent disqualification is warranted only in the event of an assessment that the employee in question was physically incapable of performing the job (J.A. 139-141). Yet Turnage and respondent believed that Ms. Vaughn's failure to make production was a result of her desire to bid off the sealex operator job, not ability (J.A. 223, 226). If Turnage believed Ms. Vaughn's problems related to a lack of motivation, it was simply inappropriate for him to disqualify her and bar her forever from re-qualifying unless his motivation was to "fix" this complaining employee "for good."

In addition to this evidence specifically challenging the assertions of the respondent regarding the basis for Ms. Vaughn's disqualification, the district court also gave careful consideration to other record evidence in an effort to place

the decisionmaking regarding Ms. Vaughn and the other named plaintiffs in the proper context, and to determine the motivation for that decisionmaking. Vaughn, 523 F. Supp. at 370, (Pet. B-4). The district court noted the past history of discriminatory employment practices of the defendant and its lack of significant improvement up to the time of trial. The court found that going back to July 2, 1965, the effective date of Title VII, almost no blacks were employed by the defendant. 471 F. Supp. 281, 284 (E.D. Ark. 1979) (J.A. 326). Similarly, the court found that only 3 of 22 office and clerical employees were black; that no blacks had ever been employed as supervisors in the defendant's office force; that only 2 of 25 or 26 supervisors who held entry-level management jobs were black;<sup>4/</sup> and that while the defendant's overall work-

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<sup>4/</sup> At the time Ms. Vaughn was disqualified

force was roughly representative of the proportion of blacks and whites in the relevant population, blacks were almost exclusively concentrated in production jobs, which were lower paying. Id. at 284 (J.A. 326).

The court also deemed probative of discriminatory intent, the petitioner's inability to explain the disproportionately

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4/ continued

as a sealex machine operator all foremen were white (Tr. 20, 69-70). During this period there was considerable racial tension at the plant between black workers and first-line supervisors (Tr. 30, 64, 151, 350-1). This condition resulted in several complaints to management of mistreatment and it spawned the filing of a number of complaints with the Equal Employment Opportunity Commission. (Tr. 12, 54, 159, 180, 358). According to a union shop steward who handled many of the complaints of black employees, the friction between black employees and foremen was greatest on the third shift. (Tr. 143). Ms. Vaughn was assigned to the third shift at the time of her disqualification. (Tr. 564).



low number of blacks obtaining positions given the high number of blacks applying for jobs at Westinghouse id. at 284-284 (J.A. 327); <sup>5/</sup> as well as the fact that of 65 persons discharged between 1972 and 1978, 39, or 60%, were black - a figure far above the proportion of black employees, which was approximately 24 or 25%. Id. at 285 (J.A. 328).

In an unpublished order, the trial court explained the rationale for its holding: "Defendant simply failed to articulate a legitimate, nondiscriminatory reason for Ms. Vaughn's disqualification." Vaughn v. Westinghouse Electric Corp., No. LR-C-74-215 (E.D. Ark., Order filed May 23, 1979). <sup>6/</sup>

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<sup>5/</sup> Tr. 277-279.

<sup>6/</sup> The relevant portion of this Order is reproduced at Vaughn v. Westinghouse Electric Corp., 620 F.2d at 659 (J.A. 340)

The petitioner, Westinghouse, appealed that decision alleging (1) that the district court misapplied the appropriate burden of proof standards and (2) that the district court's factual findings were clearly erroneous. Vaughn v. Westinghouse Electric Corp., 620 F.2d 655, 656 (8th Cir. 1980). (J.A. 346) The court of appeals held that the district court's opinion was consistent with the decisions of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); and Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

Reviewing the record and the trial court's reasoning, the Eighth Circuit, one judge dissenting, held that the lower court had not misapplied the appropriate burden of proof standards, and further held that, even if the trial court had found the

reasons articulated by Westinghouse to be legitimate and nondiscriminatory, there was sufficient evidence in the record to find those reasons to be a pretext for discrimination. Vaughn, 620 F.2d at 660 n. 4 (J.A. 355).

Similarly, the Eighth Circuit rejected Westinghouse's contention that the trial court's factual findings were clearly erroneous, holding instead:

[W]e are not "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 368, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Vaughn, 620 F.2d at 660 (J.A. 354). The Eighth Circuit denied the defendant's petition for rehearing en banc and the defendant subsequently petitioned for review in this Court.

On March 9, 1981, the Court granted a writ of certiorari and summarily vacated the judgment of the court of appeals,

remanding the cause to the Eighth Circuit for further consideration in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which had been decided five days earlier. Westinghouse Electric Corp. v. Vaughn, 450 U.S. 972 (1981). The court of appeals in turn remanded the cause to the trial court with directions to reconsider in light of Burdine. Vaughn v. Westinghouse Electric Corp., 646 F.2d 335 (8th Cir. 1981). (J.A. 361)

Following an in-chambers conference with counsel, the parties were instructed to brief two issues: (1) whether, in light of Burdine, the trial court erred in its initial holding that the defendant had failed to meet its second-stage burden of articulating a legitimate, nondiscriminatory reason for disqualifying plaintiff from her job; and (2) whether, if defendant

did in fact meet this second-stage burden of production, plaintiff should nevertheless recover because she has, on the whole case, met her burden of persuading the Court by a preponderance of the evidence that her disqualification was motivated at least in part by her race. Vaughn, 523 F.2d at 369 (Pet. B-2).

The trial court, acknowledging the holding in Burdine, that "Although 'the defendant's explanation of its legitimate reasons must be clear and reasonably specific,' 101 S.Ct. at 1096, '[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.' Id. at 1094", answered the initial question in the affirmative, observing:

Burdine holds that the defendant's burden once plaintiff makes a prima facie case, is one of production only, not of persuasion.

Vaughn v. Westinghouse Electric Corp., 523 F. Supp. 368, 370 (E.D. Ark. 1981) (Pet. B-2).

As to the second question, the trial court, reviewing the testimony and other evidence offered at trial, and considering the record as a whole, reaffirmed its prior factual findings, and held that because the plaintiff was disqualified in part because of her race, the defendant's conduct violated Title VII. Id. at 371. (Pet. B-6).

Reviewing this record for a second time, the court of appeals found that the lower court's consideration of the record as a whole was sufficient along with its detailed factual findings, to support a conclusion that Vaughn was unlawfully disqualified from her job as a sealex operator. Specifically, the court of appeals held that the decision of the lower court was not clearly erroneous. Vaughn v.

Westinghouse Electric Corp., 702 F.2d 137,  
139 (8th Cir. 1983) (Pet. A-4).

Summary of Argument

In its quest for new factual findings in this Court, the petitioner has couched its argument in terms which suggest that its "articulation" under McDonnell Douglas and Burdine, went unanswered in the district court. In so doing, the petitioner misrepresents the record below, and seeks a ruling that is inconsistent with this Court's approach of allowing some leeway for the lower courts to adjust to varying fact patterns: an approach which avoids the necessity for this Court to state inflexible rules regarding when discriminatory intent has been established. Pullman-Standard v. Swint, 456 U.S. 273 (1982).

This Court has made it plain, and the courts of appeal have generally under-



stood, that McDonnell Douglas provides an analytical framework for evaluating claims of employment discrimination which should be applied in a sensible and flexible manner. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal service Board of Governors v. Aikens, \_\_\_ U.S. \_\_\_, 75 L.Ed.2d 403 (1983).

Here, the district court and the court of appeals reconsidered their holdings in light of Burdine and correctly anticipated the thrust of this Court's holding in Aikens. The lower court considered and weighed all the evidence and was persuaded that a discriminatory reason more than likely motivated the employer. Burdine, 450 U.S. at 256; Aikens, 75 L.Ed.2d at 410.

Contrary to the assertions of the petitioner, documentary evidence was intro-

duced at trial which supported the assertions of respondent that she was, and continued to be, qualified. Moreover, in its effort to determine the motivation or intent of an act that had occurred eight years previously, the court also considered statistical and testimonial proof as to the defendant's practices as well as the effects of those practices, and firmly established the context in which the defendant's employment decisions must be judged. Notably, while the policy and practice type evidence surely applied to each of the three original plaintiffs' circumstances, it was only the respondent, Ms. Vaughn, who through testimony and documentary evidence countered petitioner's claims of incompetence and ultimately prevailed under Title VII.

The issue before this Court is whether the evidence taken as a whole establishes

sufficient evidence from which the district court could have drawn the conclusion that a violation of Title VII occurred. The Eighth Circuit has on two occasions supported the district court, affirming that its findings were not clearly erroneous. Swint. See also United States v. Yellow Cab, 338 U.S. 338 (1949).

The petitioner's reliance on Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), is similarly misplaced. The legislative history of Title VII makes it clear that Congress intended that if race played any part in an employment decision then a violation of the statute has occurred. The question of whether other factors would have resulted in the same decision in the absence of discrimination affects only the remedy that is appropriate, not whether a substantive violation has occurred.

ARGUMENT

I

The District Court In A Title VII Case Has An Obligation To Consider The Entire Record In Making Its Determination Of Whether Discrimination Has Occurred

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, this Court set forth the basic allocation of burdens and order of proof in a Title VII case alleging discriminatory treatment.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court made plain the limited nature of the defendant's second stage "articulation" requirement. There the Court held that the burden which shifts to the defendant at stage two is to rebut the presumption of discrimination by "producing evidence" that the disputed employment action was made for a "legitimate, nondis-

criminatory reason." This is accomplished, the Court held, through the introduction of admissible evidence of the reasons for the employment action. 450 U.S. at 255.

Burdine reaffirms the force of McDonnell Douglas and emphasizes the fact that, notwithstanding the minimal burden of producing evidence which the defendant faces, he nonetheless has a powerful incentive to produce more if he is to prevail. Burdine, 450 U.S. at 258. It follows that meeting that burden does not assure success for the defendant, even if the plaintiff offers no new evidence in support of his claim that the defendant's reason is pretextual. Burdine, 450 U.S. at 255, n.10. Rather, the articulation merely establishes the existence of a question of fact for the trial court. Id. at 255. Once that is established, the court must weigh the evidence, giving it whatever

credence or weight it deserves, and decide the issue of discrimination vel non on the record as a whole. See United States Postal Service Board of Governors v. Aikens, \_\_\_\_ U.S. \_\_\_\_, 75 L.Ed.2d 403 (1983).

Here the petitioner argues for a rule that would strictly limit the order as well as the type of proof that a court may review in determining who prevails on the ultimate question in an individual Title VII lawsuit. Moreover, petitioner's formulation effectively strips plaintiff of the opportunity to show, "that a discriminatory reason more likely motivated the employer" Burdine, 450 U.S. at 256, and strictly limits the plaintiff's proof to directly attacking the employee's articulated reason, thereby "showing that the employer's proffered explanation is unworthy of credence", Id. Of course, neither Burdine, 450 U.S. at 255, n.10,

McDonnell Douglas, 411 U.S. at 804-805 nor Aikens, 75 L.Ed.2d at 409, n.3 require or endorse such a formulation.

In the case at bar, the respondent's prima facie case was established by the fact that she is a member of a protected group; she was fully qualified for her position; she was disqualified by her supervisor from that position; and the position was subsequently filled by a member of the majority group.

The defendant satisfied its burden of articulation by an assertion that Ms. Vaughn was disqualified because of her failure to make production.

The employer's articulation established that there was an issue of fact to be decided, and paved the way for the court to determine whether the plaintiff had proven by a preponderance that the reasons stated were mere pretexts for discrimination.



Burdine does not demand that only evidence of a specific type or character may be considered in opposition to the defendant's articulation. Indeed, the type of evidence presented will inevitably turn on the specifics of the particular case and the strength of the defendant's articulation. As this Court stated unequivocally in Aikens:

As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See IBT v. U.S., 431 U.S. 324, 358 n. 44, 52 L.Ed. 2d 396, 97 S.Ct. 1843 (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination".)

Aikens, 75 L.Ed.2d at 409, n.3.

Consistent with McDonnell Douglas, Burdine and Aikens, the district court considered respondent's direct evidence challenging the petitioner's articulation,

as well as respondent's circumstantial evidence establishing the general policy and practices of the defendant which placed the decisionmaking in context and aided the court in determining the motivation for the employer's act.<sup>7/</sup>

The district court's careful consideration of the record below is amply demonstrated by the careful analysis it gave to the claims of respondent Vaughn and the other original plaintiffs, Ms. Gee and Ms. Crutcher. Notwithstanding the fact that

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<sup>7/</sup> The petitioner concedes, as it must, that under Aikens "a trial court must not use the McDonnell-Burdine formula as a stilted mechanism by which to structure the representations of the parties," and that "because of the very nature of 'state of mind' or 'intent' evidence, the plaintiffs may offer either direct or circumstantial proof, or both, in order to show pretext. Aikens, supra at \_\_\_, 103 S.Ct. 1282-83." (Brief for Petitioners 13.) Petitioner similarly concedes, "that the employer's pattern or practice of discrimination is admissible to show pretext" and that the trial court "should consider the entire record" in order to decide the ultimate question. (Id. at 13.)

each of the plaintiffs relied on much the same contextual evidence, only respondent prevailed on the whole record.<sup>8/</sup>

In the cases of Ms. Crutcher and Ms. Gee the court made detailed findings and concluded that the evidence unambiguously demonstrated that the two women performed poorly; had been given adequate training; were treated fairly; and had been in one instance abusive with supervisors and in another so incompetent as to have nearly caused an injury to a fellow worker or harm to the machine.<sup>9/</sup>

However, with respect to Ms. Vaughn, the district court found that there was documentary evidence showing Vaughn's satisfactory performance as a sealex machine

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8/ Indeed the district court found against Vaughn on four other claims of racial discrimination. Vaughn, 471 F. Supp. at 289 (J.A. 336).

9/ Vaughn, 471 F. Supp. at 286-288 (J.A. 330-335).

operator, Vaughn, 523 F. Supp. at 372 (Pet. B-5);<sup>10/</sup> and that she had received regular raises in her position, which was an indication of satisfactory performance, until shortly before she was disqualified Id. (Pet. B-5).<sup>11/</sup> (J.A. 338). Several witnesses testified that blacks were more closely scrutinized than their white peers. Plant rules were enforced against blacks but ignored as to whites; blacks were required to perform tasks not required by similarly situated whites; when black employees complained management appeared to find ways to uphold even arbitrary supervisory action. Not surprisingly blacks tended to be disciplined, and discharged in grossly disproportionate numbers. (See supra, pp. 2-11.)

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<sup>10/</sup> See J.A. 295, DX 36, DX 45.

<sup>11/</sup> See J.A. 287-292, DX 35q-v.

On remand, the district court noted that its prior opinion described in detail the circumstantial evidence of intent which served to place the employer's individual personnel action "in the broader context of defendant's actions over a substantial period of time."<sup>12/</sup> The court then went on to reaffirm its prior findings, observing that they had been upheld by the court of appeals, and made additional findings which related directly to Ms. Vaughn's disqualification. Vaughn, 523 F. Supp. at 370-381 (Pet. B-4, 5).

This Court's line of cases from McDonnell Douglas to Aikens<sup>13/</sup> fully recog-

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<sup>12/</sup> Vaughn, 523 F. Supp. 368, 370 (Pet. A B-4), citing Vaughn, 471 F. Supp. at 283-86 (J.A. 326-329)

<sup>13/</sup> Purnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

nize that the ultimate burden of proof in a particular employment discrimination case, as with any other type of civil litigation, rests with the plaintiff, and respondent does not seek to escape that burden. However, the petitioner apparently seeks to add substantially to that burden by severely restricting the type of evidence a plaintiff may present and how that evidence may be weighed on the question of pretext, thereby isolating the individual decision from its general practices regarding minorities.

McDonnell Douglas and its progeny express a keen sensitivity to and awareness of the societal concerns that led to the passage of Title VII in 1964. The Act reflects a national consensus that discrimination based on race and sex has been a pervasive problem in American society. Moreover, a primary focus of that problem was employment, in which blacks, other minori-

ties, and women were consistently relegated to lower paying positions regardless of other qualifications or merit. Given the pervasive and all-encompassing nature of the problem, Congress not only enacted Title VII in 1964, but strengthened it and broadened its scope by the Equal Employment Opportunity Act of 1972.

This Court's ruling in Burdine made plain the simple nature of the employer's burden in meeting the plaintiff's prima facie case. To follow that ruling by greatly restricting the plaintiff's ability to place the employer's action in the context of his general policy with regard to minority employment, would seriously curtail the ability of an individual plaintiff to establish the state of mind of his employer, or to otherwise establish pretext. The evidence adduced below showed an employment situation of subjectivity and discre-



tion regarding all types of employment decisions. (J.A. 170.) The same subjective and discretionary decisionmaking process that led to the disqualification of Ms. Vaughn was also at work in hiring, discipline, and dismissal decisions which were shown to be consistently adverse to blacks.

## II

### The Findings of the District Court Were Not Clearly Erroneous

In Pullman-Standard v. Swint, 456 U.S. 273 (1982) this Court underlined the importance of the proper application of Rule 52(a), Federal Rules of Civil Procedure, in reviewing the factual findings made by the district court. Moreover, the Court explicitly held that issues of intent are properly treated as factual matters by the trier of fact. Id at 288.

The concerns expressed in Swint were certainly understood by the Eighth Circuit,

which on two separate occasions has upheld the factual findings of the district court. In its most recent opinion in this case, that court held:

The factual findings of the district court should not be overturned unless the reviewing court is left with the definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). We cannot say, after a review of the record, that we are left with a definite conviction that a mistake was committed in the district court's findings of fact.

Vaughn, 702 F.2d at 139 (Pet A-4).

As the reviewing court found on two occasions the record amply supports the findings made by the district court. Indeed while the petitioner claims that its allegations of incompetence were unrebutted, its review of the district court's findings necessarily points to the factual basis for the district court's holding to the contrary.

The court's findings are buttressed by the fact that the district judge made a tour of the plant to observe the operation of the petitioner. The petitioner has not challenged the accuracy of the testimony or statistical evidence which formed the basis of the district court's holding. Instead it seems to challenge the weight given this evidence by the district court. Respondent submits that such an attack cannot prevail under Rule 52(a) or this Court's holding in Swint.

The district court was well aware of its responsibility to make the "sensitive and difficult" determination of an employer's "state of mind." See Aikens, 75 L.Ed.2d at 411. As such, that court was ever mindful of the fact that other evidence of discrimination occurring during the relevant time period might be probative of the employer's motivation. Accordingly

the district court admitted evidence tending to show the arbitrary and unequal exercise of supervisory discretion. (J.A. 61,170; see also Tr. 69, 206-07, 275, 309).

While on the one hand the petitioner presented testimony that Ms. Vaughn had performed her job poorly, there was contrary documentary evidence that her prior supervisors had considered her work entirely satisfactory. Indeed, the fact that Ms. Vaughn received progressive pay increases strongly suggests that her performance had been adequate to the task (Tr. 640-637; J.A. 338). In the face of conflicting assertions of competence, with no objective standards to apply in resolving that conflict, and petitioner's unsuccessful efforts to explain away its own admissions that Ms. Vaughn was qualified to perform the job, the trial judge properly concluded that discrimination had occurred. This conclusion was reached

after the trial court toured the plant, heard testimony while observing the demeanor of the witnesses, and considered all the evidence before it. Petitioner, despite two opportunities to do so, has not shown the findings of the court to be erroneous.<sup>13/</sup> The high discharge rate among blacks, and the presence of an overwhelmingly white supervisory staff, the group most likely to make recommendations for discharge or demotion;<sup>14/</sup> the fact that the job from which Ms. Vaughn was demoted was held largely by whites and the job to which she was demoted was held largely by blacks; the fact that she was replaced by a white employee (Tr. 15); the

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<sup>13/</sup> See, United States v. Yellow Cab Co., 338 U.S. 338 (1949).

<sup>14/</sup> Subjective selection processes involving white supervisors provide a ready mechanism for racial discrimination. Robbins v. White-Wilson Medical Clinic, 642 F.2d 153, Cir. 1981). James v. Stockham Valves & Fittings Co., 559 F.2d 310, 345 (5th Cir. 1977) cert. denied, 434 U.S. 1034 (1978).

fact that blacks were often harassed by supervisors and subjected to work demands different from their white counterparts; the fact that the ongoing frictions between black employees and petitioner's all-white supervisory workforce were particularly acute on Ms. Vaughn's shift,<sup>15/</sup> all suggest a working environment in which employment decisions are likely to be permeated with racial animus. In the cases of Ms. Crutcher and Ms. Gee, the trial court, on reviewing the evidence, found that they had not established by a preponderance of the evidence that they had been discriminated against. On the other hand, in the case of Ms. Vaughn, after twice reviewing the entire record in the case the trial court reaffirmed its holding that the respondent had met that burden. Clearly the district court did not

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<sup>15/</sup> Vaughn, 471 F.Supp. at 285. (J.A. 328-329).

rely on statistical and background evidence alone in finding that Ms. Vaughn's demotion was motivated by impermissible racial considerations.

### III.

#### The Circuit Court's Have Consistently And Appropriately Applied The McDonnell Douglas-Burdine Formulation

The courts of appeal have generally understood that McDonnell Douglas provides an analytical framework for evaluating claims of employment discrimination and they have been sensible and flexible in their application of its standards. Indeed the only controversy concerning this issue has involved the nature of the showing a defendant must make in order to rebut plaintiff's prima facie case.<sup>16/</sup>

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<sup>16/</sup> This controversy was resolved, however, by this Court's ruling in Burdine, 450 U.S. 248 (1981).



Now, with this Court's recent opinion in Aikens, there would seem to be even less room for confusion regarding the balancing of burdens or other legal rituals. Rather, once the parties have made their presentations, and the defendant has done all that would be required of him assuming that the plaintiff has made out a prima facie case,

The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiffs.' Burdine, supra at 253, 67 L.Ed. 2d 207, 101 S.Ct. 1089.

Aikens, 75 L.Ed.2d at 410.

Nothing more clearly illustrates this general lack of confusion than the petitioner's failure to cite specific examples of such purported confusion from any circuit other than the Eighth.<sup>17/</sup>

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<sup>17/</sup> Indeed, even the Eighth Circuit cases cited by the petitioner do not evidence confusion or any failure to understand the appropriate approach under McDonnell Douglas - Burdine. Rather, Johnson v. Bunny Bread Co., 646 F.2d 1250, 1254-1255 (8th Cir.

IV

An Employer Cannot Escape Liability Under Title VII Once Discriminatory Animus Has Been Shown to Have Been A Substantial Factor In An Employment Decision

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Petitioner's attempted reliance on the decision of this Court in Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) is misplaced.<sup>18/</sup>

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<sup>17/</sup> continued

(1981); Locke v. Kansas City Power & Light Co., 660 F.2d 359 (8th Cir. 1981); Robinson v. Arkansas State Highway and Transportation Commission, 698 F.2d 957 (8th Cir. 1983) and Danzl v. North St. Paul Maplewood-Oakdale Independent School District No. 622, 706 F.2d 813 (8th Cir. 1983), all involve reviewing courts bearing their obligation to review the record as a whole, weighing the general policy or statistical evidence if it was available, and overruling the district court if there was an inappropriate application of the standard or a finding that the lower court's findings were clearly erroneous.

<sup>18/</sup> In addition, this issue is simply not present here in that the record does not support a single, clearly defined and untainted reason for Ms. Vaughn's disqualification.

The issue before this Court is whether the evidence taken as a whole was sufficient for the district court to have drawn an inference of discrimination, i.e., whether that evidence establishes a violation of Title VII.

Respondent contends that the legislative history of Title VII makes it clear that Congress intended that if race played any part in an employment decision then a violation of the statute has occurred. Therefore, the issue of whether other factors would have resulted in the same employment decision in the absence of discrimination, only effects the remedy that is appropriate, not whether there has been a substantive violation to begin with.

The legislative history of the 1964 Act makes clear Congress was convinced that discrimination in all facets of American life, including employment, was pervasive

and needed to be rooted out in toto. Thus, the House Report states that its purpose "is to eliminate" discrimination by protecting the rights of all persons "to be free" from it.<sup>19/</sup> Senator Humphrey, the floor leader in the Senate, similarly stated that the bill makes "it an illegal practice to use race as a factor in denying employment."<sup>20/</sup> And the Senate rejected a proposal by Senator McClellan to amend Section 703(a)(1) which defines the substantive violations of Title VII, so that personnel actions were prohibited only if they were taken "solely because

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<sup>19/</sup> H. Rep. No. 88-914 (88th Cong. 1st. Sess.), reprinted in Legislative History of Title VII and XI of Civil Rights Act of 1964 (United States Equal Employment Opportunity Commission) (Hereinafter Legis. Hist. of Title VII), at p. 2026. See also remarks of Sen. Byrd, id at 3119, Cong. Rec., Senate June 9, 1964, p. 13169.

<sup>20/</sup> Id. at 3107, Cong. Rec., Senate, June 9, 1964, p. 13088 (Emphasis added).

of race, etc." <sup>21/</sup> The amendment was opposed by the Bill's sponsors because it would make it impossible to prove a violation. <sup>22/</sup>

Similarly, in 1972 when Congress reenacted and amended substantial portions of Title VII <sup>23/</sup> it made it clear that in its view employment discrimination was so pervasive that it had to be extirpated completely. For example, added to Title VII was Section 717 (42 U.S.C. § 2000e-16) which extended the provisions of Title VII to federal agencies. As this Court has held, the purpose of Section 717 was to make the same substantive law governing the private sector applicable to the federal government. Morton v. Mancari, 417 U.S. 535, 547 (1974).

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<sup>21/</sup> Id. at 3124, Cong. Rec., Senate, June 15, 1964, pp. 13837-838.

<sup>22/</sup> Ibid.

<sup>23/</sup> The Equal Employment Opportunity Act of 1972, P.L. 92-261.

Section 717 provides that "all personnel actions affecting [federal employees] . . . shall be made free from any discrimination based on race, color, religion, sex or national origin." (Emphasis added.) The clear language of this section would make it impermissible in the federal sector to hold that an employment action in which race played any part did not violate Title VII.

The legislative history of the 1972 Act leads to the conclusion that the same standards expressly stated in Section 717 should be applied to all other employers, including those in the private sector. Thus, Senator Williams, the floor manager of 1972 Act spoke of the need to "end job discrimination in our society."<sup>24/</sup> Throughout

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<sup>24/</sup> Legislative History of the Equal Employment Opportunity Act of 1972, Prepared by the Subcommittee in Labor of the Committee on Labor and Public Welfare, United States Senate (1972), (hereinafter, Leg. Hist., 1972 Act), p. 1767.

the debates are references to the need to eliminate all remaining vestiges of discrimination. <sup>25/</sup>

Finally, the decision in Mt. Healthy was based in large part on a concern that employees could insulate themselves from planned personnel actions by the simple expedient of engaging in First Amendment activities. 429 U.S. at 286. In the case of discrimination based on race, of course, the employee has no such power.

The record in this case clearly supports the conclusion that the employment decision challenged here was influenced by racial discrimination. Thus, respondent Vaughn was one of the few blacks to hold the

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<sup>25/</sup> See, e.g., remarks of Senator Williams, Leg. Hist., 1972 Act at 653, speaking of the need of "eradicating employment discrimination" and the remarks of Senator Humphrey, the chief sponsor of the 1964 Act, at Leg. Hist. pp. 670-71.



position. She was demoted by a new supervisor despite her one year performance in the position which another supervisor had initially stated was satisfactory, and there were no concrete objective standards used to measure her performance against that of her white peers. It follows that the district court was clearly correct in concluding that racial discrimination was a significant element in the decision to remove her from the job held and to put her into a lower paying position.

The purposes of Title VII would be totally frustrated if an employer could evade responsibility for such actions by asserting that racial discrimination was only one of many factors which resulted in the employment decision at issue.

CONCLUSION

For the foregoing reasons, the decision  
of the court below should be affirmed.

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No. 82-2042

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FILED

MAR 12 1984

ALEXANDER L. STEVAS.

CLERK

In The  
**Supreme Court of the United States**  
October Term, 1983

— o —  
WESTINGHOUSE ELECTRIC CORPORATION,  
*Petitioner,*  
vs.

CHRISTINE VAUGHN,  
*Respondent.*  
— o —

On Writ of Certiorari to the United States Court  
of Appeals for the Eighth Circuit

— o —  
**REPLY BRIEF FOR THE PETITIONER**  
— o —

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## QUESTIONS PRESENTED

- (1) When a generalized *prima facie* case has been rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, is the plaintiff required to present evidence concerning the particular conduct in issue in order to establish pretext?
- (2) Whether the district court's application of generalized evidence from the *prima facie* case to meet plaintiff's pretext burden effectively foreclosed defendant's opportunity to rebut the inference drawn from the *prima facie* case, and was therefore clearly erroneous or inconsistent with previously enunciated legal standards?
- (3) When discriminatory animus has been shown to have been a factor in the decision, may the defendant overcome a finding of discrimination by establishing that the challenged employment decision would have occurred in any event, even absent the discrimination?

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**REPLY BRIEF FOR THE PETITIONER**

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**ARGUMENT**

- I. Whether Respondent Has Misrepresented The Record And Mischaracterized This Dispute As A Mere Factual One, Going To The Weight To Be Applied To The Evidence?**

Respondent contends that this case is simply a fact determination falling within the strict scope of Rule 52, Fed. R. Civ. P., and that this Court is therefore limited by its recent ruling in *Pullman-Standard v. Swint*, 456 U.S.

273 (1982) to a consideration of whether the trial court was clearly erroneous in giving more weight to respondent's "proof" than to petitioner's. Respondent creates this questionable "strawman" and then proceeds to knock it down by arguing that there was a disputed fact issue concerning the respondent's performance. That is simply not the case. In that portion of her argument which respondent inappropriately calls "Statement of the Case", she sets forth the following "facts" as though they were established or at least disputed:

*That Ms. Vaughn functioned successfully as a sealex operator on other shifts* (Brief for the Respondent [Br. Resp.] at 3). While it is undisputed that Vaughn progressed satisfactorily during her first few weeks as a sealex machine operator, there is evidence that she began to have difficulties very soon in that position. She was hired into the sealex operator position on July 13, 1970 on the second shift and progressed through the pay steps according to the Labor Agreement (DX 2, JA 129, 268, Exhibit A). When she reached the top step she had held the job for only two months (DX 35r, JA 130, 288). Two months later, she was transferred to Mr. Brazil's section, still on the second shift (DX 35q, JA 130, 287). She had worked for Brazil for a little over two months when she was transferred to the third shift under Mr. Turnage, who disqualified her for excessive wasted product (DX 35p, JA 130, 286). She now had only six months experience on the job, and one-third of that time she had been rated as "poor."

*That Brazil's principal concern was Vaughn's attendance, and that he had "never documented" his production*



concerns (Br. Resp. at 5). Although Brazil had documented her attendance problems, performance concerns were also documented by Brazil. On the only opportunity he was given to evaluate Vaughn as a sealex operator, he rated her quantity and quality of work as "poor," and stated that he would not recommend re-hire, because she could "not get production" (DX 36, JA 130, 293-4). That document is the only evidence in the record in which Brazil evaluated Vaughn's performance. Brazil testified that he had talked to Ms. Vaughn about her performance, but that "it never improved. It remained poor." (JA 245). Although Vaughn speaks of Brazil primarily in a later time-frame on other jobs, she does not deny that he had talked to her about poor performance—in fact that is consistent with her complaints that Brazil was harder on her than other employees.

*That a "contemporaneous written expression" of his view of her competence "reveals that he was satisfied with her performance."* (Br. Resp. 5). It takes a fertile imagination to reach the conclusion that he had been satisfied with her performance based upon the record evidence. In fact, that finding, had it been made, would have been clearly erroneous. The alleged "expression of satisfaction" was an attachment to DX 36 (JA 130, 295), dated January 18, 1971, which has been described in the record as reflecting where the employee was moved after she was "bumped" and showing the jobs for which she was then qualified. This document is pre-printed, and blanks are filled in by a clerical employee to establish "Open Jobs" to which the employee may go, and jobs in which that employee has "Previous Satisfactory Experience". There is no place on the form for an evaluation of the employee,

nor is that the purpose of the form. Brazil would have been incorrect to say that Vaughn did not have "Previous Satisfactory Experience", since she had such experience, as far as he knew, under Supervisor Maynard before him. But when asked to evaluate her, on the form intended for that purpose, only two days after she was bumped, he rated her performance as "poor." He has never been shown to have stated otherwise. The most the Court could say was that Brazil apparently did not consider her problems serious enough to label her work "unsatisfactory." (JA 337). Respondent now tries to stretch that point to a conclusive finding of satisfactory performance, or at least a "contradictory evaluation."<sup>1</sup> That is a distortion of the record.

The important point to be made here is that, even if all of these slanted "facts" were accepted as completely true, it has nothing to do with the issue before this Court. At best, this evidence proves only that Vaughn was at least marginally competent for four months under Maynard, and "poor" but not yet subject to disqualification for two months under Brazil. It does not speak to her performance on the third shift. There the facts are established beyond equivocation. Turnage disqualified her for poor performance, and his motivation is the only issue under legal examination in this appeal.

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<sup>1</sup>As a final point, Respondent points out correctly that the record does not contain an explanation that the entry on the attachment to DX 36 was "inadvertently recorded." Petitioner was incorrect in that explanation; the document which had been so explained was DX 45, a memorandum dated January 1, 1979, referred to by the Trial Court in its first opinion (JA 338) (DX 45, JA 136, 138). The error is harmless, since Brazil had nothing to do with Turnage's evaluation of Vaughn's performance.

Respondent really taxes credulity in her treatment of the evidence concerning Turnage. The argumentative innuendo throughout what was supposed to be a statement of the case bears little resemblance to the record. It is clear that the author did not attend the trial. The respondent states as fact:

*That Turnage "conceded that he did not tell Ms. Vaughn what production standard she was expected to achieve, but asserted that she had been warned about the shrinkage problem."* What Turnage "conceded" was that he did not express the standard in terms of how many bulbs to produce. As DX 37 (JA 131, 296), and Turnage's testimony demonstrate, the standard was expressed in terms of number of errors, and after checking to be certain that the errors were not the fault of the machine, Turnage told Vaughn the precise number of errors she had made in comparison to workers on the same machines on other shifts (JA 225). He warned her that her error rate was too high (10% or more of the product), and that with that number of errors she could not make production (DX 37, 38, 39, JA 131-2, 223-226). This method is entirely reasonable, particularly when production levels vary per operator between 3500 and 9500 bulbs per day. For the respondent to argue that one method is preferable to the other is one thing, but for a court to base Title VII liability on that preference is an abuse of discretion and clear error.<sup>2</sup>

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<sup>2</sup>Respondent relies upon the assertion that, in this respect, Turnage's decision was "subjective" in the manner disapproved in *Robbins v. White-Wilson Medical Clinic*, 642 F.

*That Turnage "claims to have made" certain contemporaneous notes of his counseling sessions with Vaughn, but petitioner declined to offer corroborating testimony.* Apparently only respondent feels as though that testimony needed corroboration. The court specifically credited it, finding there was "no reason to disbelieve any of" Turnage's testimony; there was "virtually no direct evidence of unlawful motivation" as to Turnage; "the burnt wires documented by defendant in fact existed"; "production problems were a genuine concern"; and "she unquestionably had problems with production." (JA 338, Pet. App. B-6 and N. 5). These findings were made despite Vaughn's denial of any warnings by Turnage, the court plainly crediting his testimony over hers. (See, JA 43-44.)

*That Turnage not only disqualified her but "he also decreed that she would never in the future be eligible to become a sealex operator", even though there was no in-*

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(Continued from the previous page)

2d 153 (5th Cir. 1981) and *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 345 (5th Cir. 1977) cert. denied 434 U.S. 1034 (1978). Although it is preposterous to suggest that those cases are somehow analogous to this, they do serve to point out the error in calling Turnage's error rate computations "subjective" in the way that term has been used in cases such as *Robbins* and *James*. In *Robbins*, the Court held that subjectivity tainted the decisions of an interviewer who made certain broad generalizations about prospective employees based upon race, namely that blacks were less likely to have appropriate personality traits than whites. In *James*, the Court was dealing with a company that utilized racially segregated bargaining units, segregated plants, and segregated bathrooms and cafeterias, and found that the all-white supervisory staff could overrule timeliness of application, seniority, or even qualifications at will in making job assignments. Neither case should be mentioned in the same breath with this case, much less relied upon as controlling precedent. They are clearly distinguishable on their facts.

*dication in the record that a disqualified employee "could never in the future be given an opportunity to requalify."* Turnage's notation on DX 41 was simply a statement of the existing shop rule, according to the testimony of Mr. Hunnicutt (JA 137-139). In fact, the trial court found as a fact that the effect of disqualification was essentially a permanent bar to holding that job again (JA 338), absent a showing by the employee of a newly-found ability to perform. Further, even though the grievance procedure applied to her disqualification (JA 148), Vaughn never grieved (JA 342), and she never again sought the sealex job (JA 378). In short, it is simply incorrect to argue, at this stage, that the trial court read into Turnage's motivation an intent to "fix her for good" (Br. Resp. 8), when the court clearly did not so find and no evidence supports that conclusion. Respondent suggests that all of the foregoing evidence "specifically challeng[es] the assertions of the respondent regarding the basis for Ms. Vaughn's disqualification." (Br. Resp. 8). The trial court did not so find, and respondent in saying so distorts the record. The trial court in this case did not base its decision on a finding that Vaughn was a satisfactory employee on Turnage's shift. In fact, the holding is expressly to the contrary. The trial court instead held that, even though the petitioner had established its legitimate reasons, other indirect evidence caused the court to believe that race was somehow "a factor" in the disqualification. The issue is therefore not one of whether a specific fact finding was clearly erroneous, but rather whether a trial court is free to base a finding of intentional race discrimination on irrelevant or marginally relevant generalized factors, in the face of a supervisor's credited non-discriminatory reason for the action.



Respondent, as did the trial court, makes much of the "other" evidence which was supposed to be probative of discriminatory intent. A review of this "evidence" specifically referred to by the respondent shows that she is attempting to build her case upon a foundation that consists of supposition and presumption. First, the respondent sets out findings concerning black representation in the work force which, even if they were the result of discrimination, cannot be the basis for liability in Title VII case. At page 9, the respondent points to pre-act conduct, and statistics which because they are unexplained, are untrustworthy, since they, too, may only reflect pre-act conduct. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) expressly holds that pre-act or pre-charge conduct cannot be the basis for liability. Moreover, because respondent did not attempt any expert development of the evidence, it is virtually meaningless.

The respondent then relies upon hiring information (Br. Resp. 11) and a purported disparity in discharge rates. Both are meaningless here. Not one of the plaintiffs below complained about hiring, and certainly Vaughn did not. Petitioner was not required to rebut a case which was not before the court. Discharge evidence might be relevant, since discharge is akin to discipline, which again is remotely related to a disqualification from holding a particular job due to performance. But the force of such evidence in this case was virtually eliminated by the fact that, of the several claims made by the plaintiffs based upon discipline, not one other than Vaughn's was successful. As to every claim presented, the respondent gave convincing and legitimate reasons for the result. This eliminated the force of any surface inference that could argu-

ably be drawn from an apparent disparity, because the "disparity" did not go unexplained.

One plaintiff, Marian Gee, did not even contest the legality of her discharge, but rather complained about her disqualification under circumstances strikingly similar to Vaughn's (JA 334-35). In fact, the trial court's findings as to Mr. Maynard's treatment of Crutcher should apply equally to Mr. Turnage—"he made a good-faith judgment about Ms. Gee's ability to perform two particular jobs. There is no persuasive evidence that these stated reasons were merely pretextual." (JA 335). The generalized evidence which had aided in establishing a *prima facie* case was of no avail on the pretext issue, even though at the time of the decision the trial court believed the petitioner's burden was to disprove a discriminatory motive by a preponderance of the evidence (JA 337). When judged under the proper standard, it is clear that petitioner's evidence as to Gee and Crutcher was overwhelming, while as to Vaughn it should have been at the very least convincing and virtually unchallenged. In none of the cases was there any evidence which could properly be considered to establish pretext under this Court's decisions.

## **II. Does *Pullman-Standard v. Swint* Preclude Reversal Of This Case?**

The recent case of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) sets forth a long-recognized rule by which reviewing courts may allow trial judges considerable flexibility in resolving factual questions, thus respecting their ability to judge credibility and weigh the evidence. But *Pullman-Standard* does not call for the abrogation of the requirement of reviewing courts to determine whether a



mistake has been committed or whether the district court's findings rest on an erroneous view of the law. It is primarily upon this latter basis that the petitioner is before this Court, because it is clear from any objective review of the history of this litigation that the District and Appellate Court initially, and consistently thereafter, have judged the petitioner by an improper standard. The petitioner was erroneously required, in effect, to prove the absence of discrimination. There is no "disparate treatment" proof that Turnage discriminated against Vaughn or any other black employee. There is no proof that his reasons for disqualifying her were anything other than a good-faith belief that she could not or would not perform satisfactorily on his late-night shift. The trial court found no evidence going to his unlawful motivation.

Furthermore, there was no other evidence of pretext that respondent could offer, as is evidenced by her agreement to proceed on remand, without additional evidence (Pet. App. B-2). How then, could pretext be established, except by an erroneous view that the petitioner had a duty to preponderate, establishing by the weight of the evidence that it did not discriminate? That transferred burden has permeated this entire litigation. It is interesting that in *Pullman-Standard*, this Court found it suspect that the proper standard for application of Rule 52(a) came only very late in the opinion by the Court of Appeals. *Id.* at 290. At least it came in the same opinion. The proper standard was mentioned in this case only after a motion for reconsideration, an appeal, a motion for rehearing, a petition for certiorari, and a remand; even then it was not applied.

If, for the sake of argument, we were to give the lower courts the benefit of a doubt on this point, it is nevertheless clear under *Pullman-Standard* that the finding of pretext in this case was clearly erroneous. The cases are legion, as set forth in petitioner's Brief on the Merits and in the Brief Amicus Curiae, that generalized workforce statistics and unrelated testimony about other black employees lack probative force, particularly at the pretext stage. This is so because such evidence is not sufficiently related to the specific employment decision in question. Therefore, if it is to be admitted into evidence at all, it is to be accorded little weight unless there is a demonstrable nexus between that evidence and the challenged conduct. *Peques v. Mississippi State Employment Service*, 699 F.2d 760, 766-67 (5th Cir. 1983) (— U.S. —, *appeal pending*).

The determination of intent or motive is an elusive one at best, but intent questions are not insulated from review. If, however, the court erroneously requires a defendant to disprove intent, as was done here, that could adversely color the court's judgment. Further, even if the court properly assigned the burden to the plaintiff, it may still have made a mistake in applying the facts to the law. A court in considering intent may consider circumstantial evidence. Petitioner has never contended otherwise. But *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), requires that the evidence be "focused," that is, related to the issue to be resolved. When, as here, there is no direct evidence of intent, the circumstantial evidence must have some relationship to or causal connection with the challenged employment decision. If it does not, the trial court has failed in its duty

to balance the relevant evidence on each side and determine which preponderates. It has assigned far too much weight to unrelated evidence—weight that is both undeserved and legally precluded at this stage of the litigation. In so doing in this case, the trial court committed clear error, and this Court has the power and the duty to remedy that mistake.

“When findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the fact issue.” *Pullman-Standard, supra* at 292. In the instant case, however, there is only one possible resolution. On the weight of the evidence, it is clear that respondent has not met her burden to show pretext. It is also clear that she has no other evidence to offer. Finally, it is clear that the District Court has mistakenly applied the legal precedents of this Court on the issue of pretext. It is therefore entirely consistent with this Court’s previous rulings to reverse the lower courts and dismiss the claims of the respondent with prejudice.

### **III. Whether The Generalized Evidence And Statistics Relied Upon By The Courts Below Were Insufficient As A Matter Of Law To Support A Finding Of Pretext.**

As part of her prima facie case, respondent relied upon evidence of an underrepresentation of blacks in the petitioner’s white-collar, supervisory and management positions, and an overrepresentation of blacks in the lower job categories (Br. Resp. 10-11). She did not contend or prove that the lower job categories constituted the labor pool from which petitioner selected people to

fill positions in these three categories, and that, therefore, the disparity between black representation in the upper and lower levels indicated that petitioner discriminated against blacks in promotions. The respondent offered no expert analysis of these raw and, in some cases, vague and misleading numbers. Respondent did not identify the labor pool for those jobs even though that is critical in establishing a pattern and practice case. She did not identify or analyze the relevant labor market at all. The Court nevertheless erroneously drew broad, sweeping conclusions based upon this evidence.

*Hazelwood School District v. United States*, 433 U.S. 299 (1977), requires in any analysis of statistics, except the grossest of disparities, that the relevant labor pool be tailored to eliminate those persons who lack the requisite skills for the positions in issue. Respondent undertook no such tailoring, even though, as she admits, "defendant's overall workforce was roughly representative of the proportion of blacks and whites in the relevant population." (Br. Resp. 9-10). In other words, respondent admits that the petitioner hired blacks in proportion to their representation in the general population which would be significantly higher than their representation in the relevant labor pool of the workforce. This "background evidence" indicates petitioner favors rather than discriminates against blacks in the hiring process.

In the instant case, the court relied upon pattern and practice statistical evidence, unrelated to the conduct in issue, which was not sufficient as a matter of law to establish a prima facie case of discrimination even on those issues to which it did relate. If the court wished to rely

upon statistical evidence, it could have relied upon the evidence of comparatively high black representation in the production workforce of which respondent was a member. Or, even more telling, if the petitioner, who's burden it was on the pretext issue, had presented the evidence, the trial court could have compared the rate of disqualifications for poor performance among blacks and white's in the plant, Vaughn's department and shift and under her various supervisors. Instead the court used unrelated evidence, without analysis or verification, to infer pretext in petitioner's disqualification of respondent. At the same time, the court ignored the more relevant evidence, that is the number of similarly situated white employees who had been treated differently or more favorably by her disqualifying supervisor. There were none. Turnage had disqualified or fail to qualify two white employees in the only other two instances in which he had disqualified or failed to qualify anyone during a probationary period. It was clearly legal error to discount this highly probative evidence in favor of less-relevant statistics when those latter statistics could not even legally form a basis for the inference of discriminatory intent on the non-issue of promotion or discharge discrimination in the Vaughn case.

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### CONCLUSION

This is not a case wherein the petitioner has sought to limit the nature of evidence which a trial court may consider on the issue of pretext. No argument has been made in favor of a static rule to be applied in all cases. Peti-

tioner merely asks that logic and sound legal reasoning, based upon the concepts of relevance and proximate cause, apply at the pretext stage of a Title VII case as they would in any lawsuit. To argue otherwise is to avoid the burden of proof rule in *Burdine, supra*, which clearly requires a plaintiff to preponderate at the narrowly pretext stage in order to succeed. That is a hollow requirement indeed if the trial court is free to disregard the strong, specific probative evidence on the issue and find liability based upon unrelated evidence which was undeveloped by expert analysis as was respondent's burden and unrebutted by petitioner because it bore no relationship to the facts or conduct in issue as to Mrs. Vaughn. Petitioner therefore respectfully prays that the decisions below be reversed with instructions to enter judgment for the petitioner.

Respectfully submitted,

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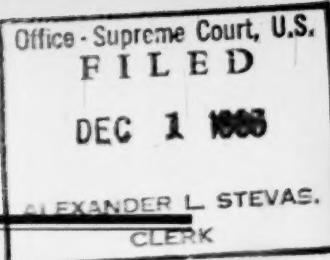
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No. 82-2042

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1982

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WESTINGHOUSE ELECTRIC CORPORATION,  
*Petitioner,*

v.

CHRISTINE VAUGHN AND MARION GEE,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL**

---

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IN THE  
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OCTOBER TERM, 1982

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No. 82-2042

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WESTINGHOUSE ELECTRIC CORPORATION,  
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On Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL**

---

The Equal Employment Advisory Council respectfully submits this brief amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of Court. This brief seeks reversal of the decision of the United States Court of Appeals for the Eighth Circuit.

**INTEREST OF THE AMICUS CURIAE**

The Equal Employment Advisory Council (EEAC or the Council) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to non-discriminatory employment practices. Its membership



comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principle of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e through 2000e-17 (1976 & Supp. V 1982) (Title VII). The Council thus has a direct interest in the allocation of the burden of proof and the use of statistical evidence in cases arising under Title VII. Because of this interest, EEAC has participated as *amicus curiae* in a number of cases in this Court involving those issues. *See, e.g., United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

This appeal offers the Court an opportunity to clarify the proper method for determining whether a legitimate, nondiscriminatory reason for an adverse employment action constitutes a mere pretext for discrimination in a Title VII individual disparate treat-

ment action. In this case, Westinghouse established that the plaintiff's poor work record provided a legitimate basis for her discharge. Of particular concern to the members of EEAC is that the district court allowed this specific evidence to be offset by broad, generalized evidence concerning the representation of blacks in the employer's work force and the company's alleged treatment of blacks other than the plaintiff, even though the generalized evidence was not linked to the particular conduct challenged in the suit nor was it the basis of an independent charge of discrimination.

#### STATEMENT OF THE CASE

The plaintiff, a black female employee of Westinghouse Electric Corporation, was hired in July 1970 as a sealex machine operator. She was transferred to the second shift in November 1970, and to the third shift in January 1971. At the time Ms. Vaughn was transferred from the second shift, her shift supervisor, Mr. Brazil, evaluated her quantity and quality of production as poor and recommended that she not be rehired in that position. After her transfer, her supervisor on the third shift, Mr. Turnage, warned her five times that her production was unacceptable. On April 19, 1971, Ms. Vaughn was disqualified from her position as a sealex machine operator and placed in a lower paying position as a bulb loader. The disqualification form stated that, while Ms. Vaughn got along well with others and had good attendance, the quality and quantity of her work as a sealex operator were poor, she showed no interest in the job, and her supervisor was unable to motivate her.

Ms. Vaughn filed the present action under Title VII of the Civil Rights Act of 1964, as amended, alleging among other things that she was disqualified

from the sealex position because of her race. After a trial, the district court dismissed the claims of the two other plaintiffs and found against Ms. Vaughn on all of her claims except the disqualification allegation. *Vaughn v. Westinghouse Electric Corp.*, 471 F. Supp. 281 (E.D. Ark. 1979). The court held that the plaintiffs had established a prima facie case of racial discrimination based upon: (a) statistical evidence relating to the low representation of blacks in non-production jobs and the hiring of black and white applicants, combined with (b) the testimony of a black former employee concerning instances of discriminatory treatment of black employees other than the plaintiffs, and (c) proof that Ms. Vaughn had held the sealex position, was disqualified, and was replaced by a white employee. *Id.* at 286, 288-90. The district court held that Westinghouse had not "borne its burden of proving that [Ms. Vaughn's] disqualification was not motivated in substantial part by racial reasons" and thus had not "overcome plaintiff's prima facie case . . . ." *Id.* at 289-90.

The Court of Appeals for the Eighth Circuit affirmed the district court decision. *Vaughn v. Westinghouse Electric Corp.*, 620 F.2d 655 (8th Cir. 1980). Judge Gibson, in a dissenting opinion, concluded that Westinghouse had shown by a preponderance of the evidence that a legitimate reason for the disqualification existed and would have remanded in order to afford Ms. Vaughn an opportunity to show that the reason was a pretext for illegal discrimination. *Id.* at 661, 662 (Gibson, J., dissenting).

On March 9, 1981, this Court vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248

(1981). *Westinghouse Electric Corp. v. Vaughn*, 450 U.S. 972 (1981). The Court of Appeals, in turn, remanded the case to the trial court with directions to reconsider in light of *Burdine*. *Vaughn v. Westinghouse Electric Corp.*, 646 F.2d 335 (8th Cir. 1981).

On remand, the district court reaffirmed its earlier judgment for the plaintiff. *Vaughn v. Westinghouse Electric Corp.*, 523 F. Supp. 368 (E.D. Ark. 1981). Although the court conceded that it had erred in requiring Westinghouse to show by a preponderance of the evidence that the disqualification was in fact motivated by Ms. Vaughn's poor performance, the court held that "plaintiff was disqualified in part because of her race." *Id.* at 370, 371. The court found that Westinghouse had articulated a legitimate, nondiscriminatory reason for the plaintiff's disqualification, acknowledged that "plaintiff's job performance did leave something to be desired," and noted that "[i]f the issue were narrowly confined to evidence bearing directly on the decision to disqualify the plaintiff, there is no question that defendant would prevail." *Id.* at 371, 370. However, when the court placed the disqualification decision "in the broader context of defendant's actions over a substantial period of time," the court was "persuaded that plaintiff's race was more likely than not one of the factors that contributed substantially to defendant's decision." *Id.* at 370, 371. The court based its finding of pretext largely upon the generalized evidence concerning the representation and treatment of blacks in the company's workforce.

In a two-to-one decision, the United States Court of Appeals for the Eighth Circuit held that the district court's finding of pretext was not clearly erroneous. *Vaughn v. Westinghouse Electric Corp.*, 702

F.2d 137 (8th Cir. 1983). Judge Fagg, dissenting, would have reversed the judgment because the plaintiff failed to meet her burden of proving pretext by a preponderance of the evidence, and quoted with approval Judge Gibson's earlier observation that "[t]he facts are devoid of any connotation whatsoever of racial discrimination." *Id.* at 139-40, 141 (Fagg, J., dissenting).

### SUMMARY OF ARGUMENT

The district court erred when it accorded generalized statistical and anecdotal evidence conclusive weight in reaching a decision during the pretext stage of this Title VII individual disparate treatment case. Because proof of discriminatory motive is required for the plaintiff to prevail, general statistics concerning the representation of blacks in an employer's work force and general testimony about the treatment of members of the protected class other than the plaintiff are of minimal importance. Such evidence may, in addition to other evidence, serve to satisfy the plaintiff's initial burden of proving a *prima facie* case of discrimination, and may be considered by the court on the issue of whether the employer's proffered explanation is pretextual. It is clear, however, that general work force statistics and, by analogy, other evidence which does not focus on the particular conduct in issue in the law suit may not be, in and of itself, controlling in an action challenging an employment decision relating to an individual, especially when the employer has proven other legitimate reasons for the decision.

The district court's decision, by allowing general evidence unrelated to the particular claim to constitute conclusive proof of pretext, would negate the requirement that discriminatory intent be proven in



disparate treatment cases. Instead, the decision below would allow an individual to prevail based upon a general reference to minority work force representation which, in and of itself, might be insufficient to establish even a *prima facie* case of disparate impact or treatment. If a court could rely on the general evidence presented in the case to find pretext even if the employer proves (and the court agrees) that the plaintiff performed poorly compared to other employees, then Title VII's established burden of proof requirements would be undermined.

Moreover, according conclusive weight to generalized evidence which is unrelated to the particular employment decision which is the subject of the plaintiff's law suit ignores this Court's instruction in *Burdine* that the factual inquiry must achieve "a new level of specificity" during the court's analysis of proof of pretext. The Court's decision clearly contemplated that, once an employer has proffered a legitimate, nondiscriminatory reason for an adverse action, the plaintiff may prove pretext only if he or she discredits this reason through proof which was sufficiently related to the particular conduct challenged in the suit and was responsive to the employer's asserted reason for the adverse action. The federal courts of appeals have long viewed generalized work force statistics as lacking in probative force at the pretext stage if they are not sufficiently related to the specific employment decision which is the focus of the individual's suit in a disparate treatment case. This is particularly the case when the employer's reason addresses the plaintiff's qualifications, which comprise one of the elements of the plaintiff's *prima facie* proof.

Finally, it is manifest that an employer's use of a production standard which is based upon objective,

observable factors may not support a finding of pretext in the absence of any evidence that the standard has been applied unfairly or has masked discrimination. Employers have the discretion to implement business judgments for any reason which is not discriminatory. Even the use of wholly subjective criteria as the basis for employment decisions violates Title VII only if the criteria were used to disguise discrimination. The production criteria used in the instant case were based upon objective, observable factors and thus could not be faulted for being likely to foster discrimination. In any case, the record is devoid of *any* evidence which would suggest that the production standard was applied unfairly. In the absence of such evidence and given the warnings of poor performance which were received by the plaintiff as well as the assistance provided to improve her performance, it was improper for the court to accord any weight to the mere fact that the production standard was not communicated to sealex operators.



### ARGUMENT

**THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT'S LEGITIMATE, NONDISCRIMINATORY REASON FOR DISQUALIFYING THE PLAINTIFF WAS A MERE PRETEXT FOR ILLEGAL DISCRIMINATION.**

In order to evaluate the propriety of the decision of the lower courts, it is important to place this suit in its proper analytical framework. This Court has recognized that two basic theories of discrimination may be used to establish a violation of Title VII. The elements of proof are different under each theory. The "disparate impact" theory is utilized to challenge employment criteria that, although facially neutral, have a substantial adverse impact on applicants or employees in a protected class and cannot be justified by business necessity. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The focus in such cases is on the consequences of employment policies, rather than the employer's motivation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Statistical proof demonstrating adverse impact is "almost totally determinative" in disparate impact actions. B. Schlei & P. Grossman, *Employment Discrimination Law* 1287 (2d ed. 1983).

In contrast, the "disparate treatment" theory requires a showing that an employer has treated some individuals less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is of paramount importance in a disparate treatment claim. *Teamsters*, 431 U.S. at 335 n.15.

The district court acknowledged in its second opinion in the present case that "[t]his is only an individual action challenging a single employee's disqual-

ification and transfer to a lesser-paying job.” 523 F. Supp. at 370. Despite the limited probative value of work force statistics (and, by analogy, general testimonial evidence regarding the treatment of blacks other than the plaintiff) in reaching an ultimate finding of intentional discrimination in an individual disparate treatment case, the court below largely relied on such evidence in reaching its finding of pretext.<sup>1</sup> As the following discussion explains, the district court erred in attaching great weight to such generalized evidence during the pretext stage of an individual disparate treatment case.

**I. In an Individual Disparate Treatment Case, Generalized Statistical Evidence of a Disparity in the Representation of the Protected Class in the Employer's Work Force and Anecdotal Evidence Regarding the Employer's Treatment of Members of the Protected Class Other than the Plaintiff Are Insufficient to Support a Finding of Pretext if Such Evidence Is Not Linked to the Particular Conduct in Issue.**

***A. The decisions of this Court recognize that specific evidence stating an employer's defense ordinarily cannot be overridden by generalized evidence that supported the prima facie case.***

The decisions of this Court clarify that, in an individual disparate treatment case, “[t]he ultimate

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<sup>1</sup> The only other evidence relied upon by the district court was the satisfactory rating given by the plaintiff's second-shift supervisor (easily overcome by the critical evaluation issued by the same supervisor later and irrelevant in any case to her disqualification by the third-shift supervisor), the fact that the plaintiff received progressive pay increases in the sealex position, and the lack of communicated objective performance standards (discussed at 24-27, *infra*), all of which would be insufficient in themselves to show that plaintiff's documented performance problems were a mere pretext for discrimination.

burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, a division of intermediate evidentiary burdens has been applied in Title VII individual disparate treatment cases in order to "progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court held that an individual plaintiff must carry the initial burden of establishing a prima facie case of disparate treatment under Title VII.<sup>2</sup> This burden is "not onerous," *Burdine*, 450 U.S. at 253, but is merely intended to force the plaintiff to "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Teamsters*, 431 U.S. at 358 n.44. Establishment of a prima

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<sup>2</sup> Under the *McDonnell Douglas* formula, a plaintiff who alleges discrimination in hiring must show:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnote omitted). The Court indicated that varying factual circumstances may require flexible application of this formula. *Id.* at n.13; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

facie case creates a rebuttable presumption that the employer discriminated against the plaintiff, *Burdine*, 450 U.S. at 254 & n.7, but must *not* be equated with an ultimate factual finding of discriminatory treatment, *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978).

In class actions alleging disparate treatment, in which a "pattern and practice" of disparate treatment is alleged, the plaintiffs' "initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer . . . ." *Teamsters*, 431 U.S. at 360. In such cases, statistical evidence is of great importance and, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977). See also *Teamsters*, 431 U.S. at 339. However, a number of courts have viewed generalized statistical evidence with skepticism as a means for establishing even a *prima facie* case of disparate treatment in a class action case. See, e.g., *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 645-64 (6th Cir. 1983), *cert. granted on other grounds*, 52 U.S.L.W. 3342 (U.S. Nov. 1, 1983) (No. 83-185), and *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 801-02 (5th Cir. 1982). Because broad-based statistics include a number of people who cannot be realistically compared to the complaining class, they are "virtually irrelevant" for comparison purposes. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 586 (1979). Moreover, the courts have recognized that, where the statistics are relevant, they must be at least "significantly discriminatory" or statistically significant to

be legally cognizable. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Hazelwood*, 433 U.S. at 308 n.14.

The requirement that there be appropriate comparative data yielding statistically significant differences in order to establish a prima facie case is even more critical in individual disparate treatment cases, which turn on individual facts and circumstances. Moreover, as discussed below, this standard is and should be applied more rigorously at the pretext stage of proof where the factual inquiry proceeds to a new level of specificity.

Upon the establishment of a prima facie case, the burden of production shifts to the employer to rebut the inference of discrimination by articulating a legitimate, nondiscriminatory reason for the employment action challenged by the plaintiff. *Burdine*, 450 U.S. at 254; *Furnco*, 428 U.S. at 577-78; *McDonnell Douglas*, 411 U.S. at 802. It is not necessary for the employer to prove the absence of a discriminatory motive in order to rebut the prima facie case, *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); the employer's evidence merely must raise "a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. Shifting the burden of production to the employer serves "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56.

If the employer carries its burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.* at 255 (emphasis added). Although the presumption raised by the prima facie case "drops from the case" at this point, the court may consider evidence previously introduced by the



plaintiff to establish a prima facie case and inferences properly drawn therefrom on the issue of whether the defendant's explanation is pretextual. *Id.* at 255 n.10. The Court in *Burdine* further explained:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. *This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.* She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

*Id.* at 256 (emphasis added). At this stage, therefore, the court "must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1482 (1983).

The *McDonnell Douglas* decision noted that evidence which "may be relevant to any showing of pretext includes facts as to . . . petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." 411 U.S. at 804-05 (emphasis added). But, as the Court made clear, generalized evidence which has no direct bearing on the particular employment practice of which the plaintiff complains usually cannot be used to override specific evidence submitted by the employer. This

is particularly the case when the employer's reason directly addresses the plaintiff's qualifications, which comprise one of the essential elements of the plaintiff's *prima facie* case. Thus, the Court stated:

The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See *Blumrosen, supra*, at 92. *We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.*

*Id.* at 805 n.19 (emphasis added). *Accord Furnco*, 438 U.S. at 580 (although "the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation," "such proof neither was nor could have been sufficient to *conclusively* demonstrate that *Furnco's* actions were not discriminatorily motivated") (emphasis in original).

The district court in the present case found that Westinghouse's asserted reasons for discharging Ms. Vaughn were pretextual even though there was "no reason to disbelieve any of" the testimony of the plaintiff's supervisor concerning problems with the plaintiff's performance, there was "virtually no direct evidence of unlawful motivation" on the supervisor's part, "the burnt wires documented by defendant in fact existed," "production problems were a genuine concern," and "no proof was offered to the effect that a white person with a work record comparable to Ms. Vaughn's was kept on the job." 523



F. Supp. at 370-71, 371 n.5. The conclusion is incapable that the lower court gave conclusive effect to the plaintiff's evidence relating to "the broader context of defendant's actions over a substantial period of time," 523 F. Supp. at 370, i.e., the work force statistics and the testimony of Ms. Donley concerning the general treatment of other black employees, in reaching its decision that the company intentionally discriminated against the plaintiff.<sup>3</sup> This was error, for the reasons explained below.

***B. The decisions below negate the distinction between disparate treatment and disparate impact cases.***

This Court's decision in *Burdine* indicates that, if an employer carries its burden of production by articulating a legitimate, nondiscriminatory reason for an adverse action, "the presumption raised by the prima facie case is rebutted . . . ." 450 U.S. at 255. If the district court decision in the instant case is allowed to stand, however, general, unrefined evidence of disparities in the representation of blacks in the work force (often introduced by Title VII plaintiffs in satisfying their burden of establishing a prima facie case) would be permitted to assume overwhelming importance in the determination of pretext even if the general evidence is not linked to the particular conduct in issue. Such an approach would allow an unqualified plaintiff in an individual disparate treat-

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<sup>3</sup> The only specific evidence introduced by the plaintiff which arguably attempted to discredit the company's rebuttal evidence was the satisfactory rating given by the plaintiff's second shift supervisor. This evidence is irrelevant when one considers Westinghouse's unrefuted evidence of Ms. Vaughn's performance problems after her transfer to the third shift.

ment action to prevail based upon a showing of adverse impact alone, thereby blurring the distinction between disparate impact and disparate treatment cases and undermining the requirement that discriminatory *intent* be shown in disparate treatment cases. *Cf. Clark v. Huntsville City Board of Education*, 717 F.2d 525, 529 (11th Cir. 1983) (a court "may not circumvent the intent requirement of the plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext").

***C. The evidence produced below was not probative of the employer's alleged disparate treatment of the plaintiff.***

According conclusive weight to generalized evidence which is unrelated to the particular disqualification challenged by the plaintiff also ignores *Burdine's* mandate that "the factual inquiry [proceed] to a new level of specificity" during the court's analysis of proof of pretext. 450 U.S. at 255. The Court's decision in *Burdine* clearly contemplated that, once an employer has proffered a legitimate, nondiscriminatory reason for an adverse action, the plaintiff may prove pretext only if he or she rebuts this reason through proof which is sufficiently related to the particular conduct challenged in the suit and responsive to the employer's asserted reason for the adverse action.

In the present case, the only inquiry which was relevant at the pretext stage was whether or not Westinghouse intentionally discriminated against the plaintiff when it disqualified her from the sealex job. Thus, Ms. Vaughn could perhaps have established

pretext through the introduction of evidence which supported an inference of discrimination by, for example, comparing the disqualification rates of black and white production or sealex workers, comparing the production rates of white employees who remained in their positions and black employees who were disqualified or, best of all, comparing her performance with that of similarly situated white employees who were not disqualified. Such evidence at least would have been probative on the issue of the company's discriminatory animus and thus highly relevant to a determination of pretext.

However, the plaintiff did not (or perhaps could not) introduce such specifically-tailored evidence. Even though the plaintiff had not alleged in her complaint that Westinghouse had discriminated against blacks generally or that the company's hiring or promotion practices were discriminatory, she relied upon broad statistical and anecdotal evidence relating to these employment practices without showing in any way that such evidence was relevant to her disqualification from the sealex position. At the pretext stage, prima facie evidence "must be given 'whatever weight and credence it deserves' *in light of the defendant's rebuttal evidence.*" *Wells v. Gotfredson Motor Co.*, 709 F.2d 493, 496 n.1 (8th Cir. 1983), *quoting Aikens*, 103 S.Ct. at 1481 n.3 (emphasis added). Because the plaintiff did not produce any proof which was specifically related to the challenged disqualification and thereby discredited the legitimate, non-discriminatory reason proffered by Westinghouse, the district court's finding of pretext is inconsistent with *Burdine* and must be overturned.

**D. Federal court decisions overwhelmingly hold that the types of statistical evidence relied upon below cannot provide the basis for establishing an individual disparate treatment case.**

An interpretation of *Burdine* which requires that the plaintiff produce evidence which focuses on the particular conduct in issue and the particular reason proffered by the employer in order to demonstrate pretext is also consistent with federal court decisions under Title VII. These cases clarify that "statistics alone will not suffice to prove pretext in individual disparate treatment cases" and that "[t]he probative value of any statistical evidence offered in [individual] disparate treatment cases will depend upon its relevance to the conduct in question." B. Schlei & P. Grossman, *Employment Discrimination Law* 1316 & n.72 (2d ed. 1983). It is well-established among the federal courts of appeals that generalized work force statistics cannot prove pretext in the absence of a correlation to the particular conduct challenged by the plaintiff. Thus, in *Bauer v. Bailar*, 647 F.2d 1037 (10th Cir. 1981), the district court rejected the plaintiff's attempt to prove that the employer's refusal to promote her was pretextual by statistical evidence of the historical underrepresentation of women among the company's supervisory personnel. On appeal, the plaintiff argued that the district court should have given more weight to her statistical evidence. The United States Court of Appeals disagreed:

The significance of statistical evidence in any given case depends on all the surrounding facts and circumstances. *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 340, 97 S.Ct. at 1856. Statistical evidence should be closely related to the issues in the case.

*Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975) . . . . Even statistics which show prolonged and marked imbalance [in an employer's work force] may not be controlling in an individual discrimination case where a legitimate reason for the employer's action is present. *McDonnell Douglas Corp. v. Green*, *supra* 411 U.S. at 805, n.19, 93 S.Ct. at 1826 n.19.

The statistical evidence presented by plaintiff in this action does not furnish any support for an inference that defendants engaged generally in discrimination against females in promotion. . . . To draw an inference of discrimination from the statistics alone would be to require perfect balance between the proportion of female employees and the proportion of female supervisors. The law does not require this. The real question is whether the 1975 promotions, and those promotions alone, involved discrimination on the basis of sex. The trial court focused on this question, giving no express consideration to plaintiff's statistical evidence. We cannot conclude that this omission was plain error . . . .

*Id.* at 1045.

Similarly, the United States Court of Appeals for the Eighth Circuit has held that, without additional evidence, the connection between statistics concerning the number of blacks employed as millwrights and carpenters and an individual plaintiff's discharge "is too attenuated to compel a finding of [racially discriminatory] motive." *Person v. J. S. Alberici Construction Co.*, 640 F.2d 916, 919 (8th Cir. 1981). *Accord Johnson v. Bunney Bread Co.*, 646 F.2d 1250, 1255 (8th Cir. 1981) (in light of evidence of legitimate reasons for discharge of the plaintiffs and the



fact that plaintiffs introduced no evidence to the contrary, generalized statistics showing the number of blacks discharged and black representation in the company's work force were insufficient to carry plaintiffs' burden of establishing pretext because connection between these statistics and the discharges was "too attenuated").

Several other recent cases further demonstrate the very limited probative value of generalized statistical evidence at the pretext stage. In *Woodard v. Lehman*, 717 F.2d 909, 913 n.5 (4th Cir. 1983), the court found that the plaintiff's evidence comparing the racial composition of employer's work force with general area population "plainly was not pertinent to charges of individual acts of discrimination [in promotions] against employees already employed." The court thus held that the district court did not err in dismissing such statistical evidence as irrelevant in reaching its conclusion regarding pretext. The Seventh Circuit, employing a similar analysis, recently held that, although the trial court technically erred in refusing to consider plaintiff's statistical ethnic profile of the employer's management and its workforce, this error was insignificant because the evidence could not have assisted in the establishment of a discriminatory motive. *Soria v. Ozinga Bros.*, 704 F.2d 990 (7th Cir. 1983). The court emphasized that the plaintiff's expert had admitted that he had no basis for linking the company's disciplinary procedures, which were challenged by the plaintiff as discriminatory, with the statistics relating to the company's hiring or promotion process. Finally, in *Smithers v. Bailer*, 629 F.2d 892, 899 (3d Cir. 1980), the appellate court determined that the plaintiff's statistics were of no help in proving that the employer's evi-

dence of nondiscriminatory reasons for failure to promote the plaintiff was a pretext because the statistics "fail[ed] to bear a sufficient relationship to the conduct at issue."<sup>4</sup>

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<sup>4</sup> See also *Talley v. United States Postal Service*, 33 Fair Empl. Prac. Cas. (BNA) 361, 363 (8th Cir. 1983) (plaintiff's statistical proof was "overbroad and generalized" and did not necessitate a finding of pretext in an individual disparate treatment case); *Cross v. United States Postal Service*, 639 F.2d 409, 414 (8th Cir. 1981) (evidence of Postal Service's treatment of other minority individuals, specifically the fact that 21 of 38 persons in particular jobs were nonwhite, did not serve to rebut plaintiff's evidence of discrimination); *Terrell v. Feldstein Co.*, 468 F.2d 910, 911 (5th Cir. 1972) (statistics are not determinative of an employer's reason for an action taken against the plaintiff in an individual disparate treatment case; record contained ample evidence to support the conclusion that plaintiff was discharged for nondiscriminatory reasons); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972) ("lopsided ratios [in statistical compilations] are not conclusive proof of past or present discriminatory hiring practices"); *Murphy v. Middletown Enlarged City School Dist.*, 525 F. Supp. 678, 692-93 (S.D.N.Y. 1981) (statistics comparing percentages of minority students with minority teachers, percentages of male and female teachers, and percentages of black school administrators with total black work force of county and total school administrative work force in state do not prove pretext in denial of promotion to a single black teacher); *Metcalf v. Omaha Steel Castings Co.*, 507 F. Supp. 679, 689 (D. Neb. 1981) (where statistical evidence regarding representation of blacks in company's work force did not pertain to company's treatment of employees who, like plaintiff, had complained of sickness, figures were too inconclusive to prove pretext, particularly in presence of otherwise justifiable reason for discharge); *Osborne v. Cleland*, 468 F. Supp. 1302, 1303-04 (E.D. Ark. 1979), *aff'd*, 620 F.2d 195 (8th Cir. 1980) (statistical evidence failed to establish pretext where statistical proof compared presence of blacks in higher grade supervisory jobs with presence in general population and plaintiff merely complained of discrimination in discharge);



Relevant Supreme Court and federal appeals court precedent thus establishes that, although a court may take generalized prima facie evidence into account when it is determining whether there has been adequate proof of pretext, generalized work force statistics and, by analogy, general testimony concerning the treatment of other members of the protected class cannot be given conclusive effect in an individual disparate treatment case. The plaintiff must introduce evidence which relates more specifically to the conduct in issue in order to prove that the legitimate, nondiscriminatory reasons proffered by an employer are a mere pretext for discrimination. Because the plaintiff in the present case did not produce specific evidence pertaining to her disqualification which discredited the employer's evidence of performance problems, the district court erred in finding pretext.

***E. The burden of proof scheme developed under Title VII cannot be interpreted as a shield for a proven unproductive employee.***

Allowing general, unrelated evidence of a disparity in the representation of blacks in a company's work force introduced in support of a prima facie case of individual disparate treatment to constitute conclusive proof of pretext would negate the requirement that discriminatory motive be shown in disparate treatment cases and, in effect, *prevent* an employer from taking an adverse action against an unproductive member of a protected class without subjecting itself to Title VII liability.

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*Weaden v. American Cyanamid Co.*, 14 Fair Empl. Prac. Cas. (BNA) 533, 535 (N.D. Fla. 1976) (statistical comparison which failed to focus on blacks who, like plaintiff, were rejected after medical exam is not probative in individual disparate treatment case).

Pursuant to the district court's analysis, if an employee within a protected class introduces as part of his or her prima facie case evidence tending to show that that protected class is underrepresented in particular job categories or in the company's work force as a whole, the court could rely on that general evidence to find pretext even if the employer *proves* that the plaintiff performed poorly, the plaintiff fails to discredit this reason through specific, relevant evidence (either direct or indirect), and the court agrees that performance problems in fact existed. But, just as "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race without regard to whether members of the applicant's race are already proportionately represented in the work force," *Furnco*, 438 U.S. at 579, it is also clear that Title VII should not be utilized as "an automatic shield for every black employee who claims unfair treatment," *Vaughn v. Westinghouse Electric Corp.*, 620 F.2d at 287, by allowing disparities in the representation of the protected class in the employer's work force to prevent the justifiable disqualification of a member of the protected class.

**II. An Employer's Use of a Production Standard Which Is Based Upon Objective, Observable Factors May Not Contribute to a Finding of Pretext in the Absence of Evidence that the Standard Has Been Used to Disguise Discrimination.**

The district court acknowledged in the case at bar that "the absence of objective criteria cannot be legally dispositive." The court admitted, however, that it may have reached a different decision in the case "[i]f defendant had set a numerical standard of production, communicated it to its employees, and

enforced it uniformly . . . ." 523 F. Supp. at 371 & n.4. It is not entirely clear whether the court considered the sealex performance standards to be "subjective" or whether the court merely was critical of the company's failure to communicate an objective standard to its employees.<sup>5</sup> In either case, there is no justification for the district court to have accorded *any* weight to the lack of a communicated production standard in its determination of pretext.

It is well settled that Title VII does not prohibit employers from making subjective business judgments or from making decisions for any reason that is not discriminatory. Title VII was not meant to "diminish traditional management prerogatives." *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979). Thus, an "employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine*, 450 U.S. at 259. The proper focus is on the employer's motivation and not on its business judgment. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

It is not unlawful *per se* for an employer to use even wholly subjective criteria in making employment decisions. B. Schlei & P. Grossman, *Employment Discrimination Law* 191 (2d ed. 1983); *see, e.g., Brooks*

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<sup>5</sup> The district court found in its first decision that Westinghouse's supervisors had numerical standards to judge performance, 471 F. Supp. at 290, but apparently faulted Westinghouse for failing to communicate these standards to its employees. However, Ms. Vaughn certainly received fair notice of her failure to meet sealex production standards. Westinghouse established that she was warned about her production problems on five occasions and was told that her rate of burnt wires was much higher than that of the other sealex operators. *See* 702 F.2d at 140 (Fagg, J., dissenting).

*v. Ashtabula County Welfare Department*, 717 F.2d 263, 267 (6th Cir. 1983); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on another issue*, 423 U.S. 809 (1975). Title VII "comes into play only when such practices result in discrimination." *Hester v. Southern Railway*, 497 F.2d 1374, 1381 (5th Cir. 1974) (emphasis added). The issue in each case is "whether the subjective criteria were used to disguise discriminatory action." *Ramirez v. Hofheinz*, 619 F.2d 442, 446 (5th Cir. 1980).

Moreover, the production criteria relied upon by Westinghouse in disqualifying the plaintiff were based upon an objective, observable factor—the rate of burnt wires—and thus differ dramatically from the types of criteria which have been held to have been used to disguise discriminatory action.<sup>6</sup> In the present case, as in *Markey v. Tenneco Oil Co.*, 439 F. Supp.

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<sup>6</sup> See, e.g., *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315-17 (5th Cir. 1980) (a criterion for evaluation of hourly personnel simply referring to "skill" which was not based on any written evaluation or articulated standard was dependent on highly subjective elements and, in combination with statistics and racial incidents, raised inference that whites were treated more favorably in promotions); *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1386 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979) (complete subjectivity likely where evaluation method placed undue reliance on general character traits); and *Mistretta v. Sandia Corp.*, 15 Fair Empl. Prac. Cas. (BNA) 1690, 1711 (D.N.M. 1977), *aff'd in relevant part*, 639 F.2d 588 (10th Cir. 1980) (evaluations were excessively subjective where they were "not based on any definite, identifiable criteria based on quality or quantity of work or specific performances that were supported by some kind of record").

219, 225 (E.D. La. 1977), *aff'd in part and rev'd and remanded in part on other grounds*, 635 F.2d 497 (5th Cir. 1981), the production standard used was "susceptible to fairly objective ascertainment." It thus cannot be viewed as being likely to foster discrimination by "leav[ing] ample room for the operation of . . . bias." *Stallings v. Container Corp.*, 75 F.R.D. 511, 521 (D. Del. 1977).

In any case, the record is devoid of any evidence which would support even an inference that the production standards employed by Westinghouse were applied unfairly or in any way masked discrimination. The plaintiff did not produce any evidence that black employees were disqualified more often than white employees, nor did she point to a single white employee with a similar record of burnt wires who had been retained as a sealex operator. In the absence of any direct or indirect evidence that the sealex production standard was used as a pretext to discriminate against the plaintiff, it was error for the court to accord weight to the lack of a publicized standard.

**CONCLUSION**

For the foregoing reasons, the Amicus respectfully urges that the decision of the appellate court be reversed with instructions to enter judgment for the defendant, Westinghouse Electric Corporation.

Respectfully submitted,

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December 1, 1983



[SHOW ]

PROCEEDINGS AND ORDERS

CASE NBR 82-1-02042 CFX  
SHORT TITLE Westinghouse Elec. Corp.  
VERSUS Vaughn, Christine

DOCKETED: Jun 8 1983

Date	Proceedings and Orders
Jun 8 1983	Petition for writ of certiorari filed.
Jul 13 1983	DISTRIBUTED. September 26, 1983
Jul 18 1983	Brief of respondents in opposition filed.
Oct 11 1983	REDISTRIBUTED. October 14, 1983
Oct 17 1983	Petition GRANTED. *****
Nov 30 1983	Joint appendix filed.
Dec 1 1983	Brief amicus curiae of Equal Employment Advisory Council filed.
Dec 1 1983	Brief of petitioner Westinghouse Elec. Corp. filed.
Jan 3 1984	Order extending time to file brief of respondent on the merits until January 9, 1984.
Jan 6 1984	Stipulation to dismiss writ of certiorari as to Marion Gee only and order of dismissal pursuant to Rule 53.
Jan 9 1984	Record filed.
Jan 9 1984	Certified original record & C.A. proceedings, 6 volumes, received.
Jan 9 1984	Brief of respondent Christine Vaughn filed.
Feb 14 1984	SET FOR ARGUMENT. Monday, March 19, 1984. (3rd case)
Feb 15 1984	CIRCULATED.
Mar 12 1984	Reply brief of petitioner Westinghouse Elec. Corp. filed.
Mar 19 1984	ARGUED.